LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
APR 19 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No. 74-1317

THE LAIDLAW CORPORATION, *Petitioner*,

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Seventh Circuit

ALLEN W. TEAGLE,
WESLEY J. FASTIFF,
WILLIAM F. TERHEYDEN,
LITTLER, MENDELSON & FASTIFF,
480 California Street, 25th Floor,
San Francisco, California 94108.
Telephone: (415) 431-1948.
Attorneys for Petitioner.

PERRAU-WALSH PRINTING CO., 550 MISSION STREET, SAN FRANCISCO, CA. 94105

Subject Index

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statement of the case	2
A. The Findings and Conclusions of the Administrative Law Judge	2
B. The Order of the Administrative Law Judge	4
C. The Order of the Board	4
D. The Decision of the Court of Appeals	4
Reasons for granting the writ	5
1. The Seventh Circuit's decision has resulted in a split in the Circuits on the issues of whether a discriminatorily discharged employee must lower his sights when seeking interim employment and whether the Board must take this issue into consideration and make a finding on that issue when reviewing a backpay decision of an Administrative Law Judge	6
2. The Seventh Circuit Court of Appeals Decision contravenes a decision of this Court by treating as fully collateral a strike benefit that was partially preconditioned on picketing	11
Conclusion	14

Table of Authorities Cited

Cases Pages

National Labor Relations Board v. Gullett Gin Co., 340 U.S. 361 (1951) 11, 12, 13, 14

NLRB v. Madison Courier, Inc., 505 F.2d 391 (D.C. Cir. 1974) (216 NLRB No. 84 (1975)) 8, 10

National Labor Relations Board v. Moss Planing Mill Co., 224 F.2d 702 (4th Cir. 1955) 6

National Labor Relations Board v. Southern Silk Mills, 242 F.2d 697 (6th Cir. 1957), cert. denied, 355 U.S. 821 (1957) 7, 8

Codes

28 U.S.C., Section 1254(1) 2

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No.

THE LAIDLAW CORPORATION, *Petitioner,*

VS.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Seventh Circuit

Petitioner, the Laidlaw Corporation, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit enforcing an order of the National Labor Relations Board providing certain amounts of backpay for certain of the Company's employees.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 507 F.2d 1381 and appears at Appendix A, infra,

pp. 1-5. The Order of the National Labor Relations Board is reported at 207 NLRB No. 94 and appears at Appendix C, infra, pp. 8-9.

JURISDICTION

The judgment of the Court of Appeals was entered on January 22, 1975. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a discriminatorily discharged employee must lower his sights when seeking interim employment and whether the National Labor Relations Board must make a finding on that issue when reviewing a decision of an administrative law judge?

2. Whether a strike benefit that is partially preconditioned on picketing may be deemed wholly collateral?

STATEMENT OF THE CASE

A. The Findings and Conclusions of the Administrative Law Judge

A prior order of the Board directed the Laidlaw Corporation to reinstate and make whole certain of its employees for any loss of earnings suffered by reason of its discrimination against them during the course of a strike (App. D, p. 10). As the parties failed to agree upon the amount of backpay due certain discriminatees, a Backpay Specification was issued by the Regional Director of the Board for Region 25

claiming designated amounts of backpay for certain employees of the Corporation who had been discriminated against. (App. D, p. 10).

Subsequent to a hearing on the determination of backpay the administrative law judge found that strike benefits were paid on the basis of the striker's family situation (App. D, p. 17), and that the picketing requirements were not absolute (App. D, p. 18). He found that pickets who worked additional shifts were compensated with additional monetary amounts (App. D, p. 18), and that the payment of strike benefits was not keyed to picketing alone (App. D, p. 19). In addition, the judge found that to qualify for strike benefits the discriminatees were required to do some picketing but the benefits themselves were predicated on the need of the employee rather than on the amount of picketing performed. (App. D, p. 19). The judge did not reduce an employee's backpay by any amount for strike benefits received.

The judge considered generally, on the issue of availability of desirable alternative employment, the nature of the employment market in that part of Indiana in which Laidlaw's plant was located (App. D, p. 21). The judge found that employment advertisements in the Peru Tribune covering a part of the backpay period indicated that there was no regular labor market available for the type of employees represented among the discriminatees (App. D, p. 22). He additionally found that occasional ads appeared for grocery clerks in Peru but by and large the newspapers revealed little market for the production, as-

sembly and shipping capabilities of most of the discriminatees (App. D, p. 22).

The judge made findings on when these backpay periods for the employees began and ended (App. D, pp. 25-63). In only one case among 51 did the judge consider whether an employee should have lowered his or her sights in seeking interim employment (App. D, pp. 33-34). The judge adjusted the backpay specifications according to the employment circumstances of each individual employee during the period that they were not employed by the Corporation because of being discriminated against. (App. D, pp. 25-63). He made recommendations on the amounts of backpay due each for that period (App. D, pp. 25-63)

B. The Order of the Administrative Law Judge

The Administrative Law Judge ordered that the Laidlaw Corporation shall pay to named employees as net backpay certain designated amounts plus interest.

C. The Order of the Board

The Board affirmed the rulings, findings, and conclusions of the Administrative Law Judge and adopted his recommended Order. It ordered that the Company take the action set forth in said recommended Order.

D. The Decision of the Court of Appeals

The Court of Appeals enforced the Board's order directing the Company to pay designated amounts of backpay to certain named employees.

REASONS FOR GRANTING THE WRIT

This case involves a clear conflict among the Circuit Courts of Appeals on the scope and depth of the search that must be made by discriminatorily discharged employees seeking interim employment. It further involves a conflict on the specific question of whether the Board must review and make a finding on whether the employee was required to lower his sights and seek available interim employment in occupational fields other than his own. Until these conflicts are resolved, employers in the Seventh Circuit will be subject to a more stringent standard concerning backpay liability as employees in that Circuit are not required to lower their sights when seeking interim employment, nor is the Board required, according to that Circuit, to review or make a finding on that issue.

In addition, this petition involves the important question of whether a prior decision of this Court has been contravened by the Seventh Circuit's Order to enforce the Board's backpay decision herein that strike benefits partially preconditioned on performing picketing duties are collateral.

1. **THE SEVENTH CIRCUIT'S DECISION HAS RESULTED IN A SPLIT IN THE CIRCUITS ON THE ISSUES OF WHETHER A DISCRIMINATORILY DISCHARGED EMPLOYEE MUST LOWER HIS SIGHTS WHEN SEEKING INTERIM EMPLOYMENT AND WHETHER THE BOARD MUST TAKE THIS ISSUE INTO CONSIDERATION AND MAKE A FINDING ON THAT ISSUE WHEN REVIEWING A BACKPAY DECISION OF AN ADMINISTRATIVE LAW JUDGE.**

The United States Court of Appeals for the Seventh Circuit specifically held that the findings of the administrative law judge as to each discriminatee's diligent search for employment were supported on the record (App. A, pp. 4-5). However, in each of the individual cases considered by the administrative law judge, with only one exception, he merely concerned himself with a general review of whether the employee made a good faith effort to secure reasonable interim employment. The judge made no review or finding, except in the sole case that will be noted, of whether the particular employees should have lowered their sights and sought particular lower-paying jobs in different fields. There was no finding made on this issue despite extensive evidence concerning the length and scope of employee searches and the availability of suitable employment opportunities in other fields.

Three of the Circuit Courts of Appeals have effectively adopted the "lowering of sights" doctrine and applied it to discriminatorily discharged employees seeking interim work.

The Fourth Circuit in *National Labor Relations Board v. Moss Planing Mill Co.*, 224 F.2d 702 (4th Cir. 1955), held that a company fireman with knowl-

edge of how to perform agricultural work was obligated to seek and accept agricultural employment.

The Sixth Circuit in *National Labor Relations Board v. Southern Silk Mills,* 242 F.2d 697 (6th Cir. 1957), cert. denied, 355 U.S 821 (1957), denied enforcement of the Board's order which held that there was no obligation on the part of a discriminatee to lower his sights and accept a lower paying position, and that the obligation to minimize his loss of earnings is satisfied if he makes reasonable efforts to find new employment which is substantially equivalent to the position from which he was discharged and is suitable to a person of his background and experience. The Board had not approved findings of a Trial Examiner that:

> "there comes a time after opportunities for comparable jobs have been canvassed without success, when *the job applicant must lower his sights* or face a long period of idleness." *Id.* at 699 (emphasis added),

and that after seven months the striking textile knitters should have sought lower-paying positions.

The Sixth Circuit Court held that

> "the failure of these two employees, under the conditions existing in the present case, to seek or take other suitable, available employment, although at a lower rate of pay, over a period of approximately three years, constitutes to some extent at least loss of earning, 'willfully incurred.' We are of the opinion that the Board was in error in making the backpay awards without offsetting credits against such losses." *Id.* at 700.

The Court remanded to the Board for additional findings for this issue, and expressly said:

> *"The Board has made no finding* with respect to their efforts to obtain satisfactory, although lower-paid, employment in other available fields." *Ibid.* (emphasis added).

The District of Columbia Circuit, in *NLRB v. Madison Courier, Inc.,* 505 F.2d 391, (D.C. Cir. 1974), held that "a striker must make a reasonably diligent search for suitable interim employment", and established criteria for determining suitable interim employment. *Id.* at 395. In remanding the case to the Board the Court held that printing employees "should have broadened the scope of their search and sought suitable non-printing employment." *Id.* at 402. The Board subsequently awarded backpay in accord with the decision of the Court of Appeals. 216 NLRB No. 84 (1975).

Employers in the Fourth, Sixth, and District of Columbia Circuits are not forced to bear responsibility for backpay if an employee did not seek employment in a different field after a reasonable length of time. In those Circuits, the Board must, at the very least, review the background and prior experience of the individual and ascertain whether a particular available interim position in a different field was suitable. If a finding of suitability is made, the employee's backpay will be reduced if he did not lower his sights and seek that position after a reasonable amount of time.

However, in the Seventh Circuit, there exists no duty on the part of an employee to lower his sights after a reasonable period and to seek employment in an occupational area different than the one in which he previously worked. Additionally, there is no requirement in the Seventh Circuit that the Board review and make a finding on the suitability of a prospective available position in another field or on the efforts of the employee to seek that position after a certain time. All that is required is that an employee make a diligent search for some employment, and the Board need not consider the nature or suitability of the available positions. Employers are thus unfairly discriminated against in the Seventh Circuit by the failure of the Court of Appeals in that Circuit to apply the same standards that are applied by the Courts of Appeals for the Fourth, Sixth, and District of Columbia Circuits.

The conflict between the Circuits could not be more sharply posed. In the Fourth, Sixth, and District of Columbia Circuits employees must do more than merely search diligently for employment in their same field. After a reasonable period of time, they must lower their sights and seek employment in fields other than their own, even if it means accepting an available position at less pay or in another field. If they fail to do so, the employer's liability for backpay is reduced. This requirement is not enforced, considered, nor even recognized in the Seventh Circuit, to the prejudice of the employer faced with a backpay claim in that Circuit.

It is imperative that this Court now resolve the clear conflict between the Circuit Courts of Appeals on this important issue which affects countless numbers of employers and employees. Backpay issues are more urgent and important in times like these when the national economy is depressed. Hard bargaining and industrial strife thrive on economic adversity. Under these circumstances an increase in cases involving backpay issues can be expected. The Court should clearly define the duties of employees to mitigate damages in those cases where backpay is awarded, and make uniform the required scope of the employment search.

In the instant case, as the administrative law judge found, the employer demonstrated that there were jobs available in occupational fields other than that normally worked in by the employees (App. D, p. 22). The employer inquired of employees on the record whether they had sought employment in fields other than their own, and their responses indicated that they had not (R. 758, 846, 952, 1157, 1183, 1201). The backpay period for most of these employees began in February, 1966 (App. D, pp. 25, 28), and ended in November, 1966 when the company offered them reinstatement (App. D, p. 27, p. 29) or December, 1966 when they returned to work at the company (App. D, pp. 27, 28, 29, 34, 36, 40, 42, 43, 44, 45, 50, 60, 61). This nine to ten month period is clearly in excess of the three month period in *NLRB v. Madison Courier, Inc., supra,* after which time, the District of Columbia Circuit held, an employee must lower his sights.

Yet the administrative law judge in the instant case made no finding, with one exception (App. D, p. 34), as to whether any of these employees were at any time required to lower their sights and seek employment in fields other than their own. The administrative law judge's failure to make a finding regarding the other employees on this issue was not deemed insufficient by either the Board or the Seventh Circuit Court of Appeals. Neither the Board nor the Court even discussed this issue.

The Seventh Circuit's decision denies employers in that Circuit the same treatment accorded employers in backpay cases in other Circuits. Petitioner respectfully submits that the differences in the holdings between the Circuits on this vital issue compel the granting of this petition.

---

2. THE SEVENTH CIRCUIT COURT OF APPEALS DECISION CONTRAVENES A DECISION OF THIS COURT BY TREATING AS FULLY COLLATERAL A STRIKE BENEFIT THAT WAS PARTIALLY PRECONDITIONED ON PICKETING.

"Payments to the employees were not made to discharge *any* liability or obligation . . . these facts plainly show the benefits to be collateral." *National Labor Relations Board v. Gullett Gin Co.*, 340 U.S. 361, 364 (1951) (emphasis added). If payments are made to a striking employee by a union to discharge a liability or obligation that arose out of picketing or other service rendered, the *Gullett* decision requires that the Courts of Appeals treat union payments for that discharge as payments not collateral in nature.

In the instant case, the Seventh Circuit enforced a National Labor Relations Board decision upholding the finding of an administrative law judge that the "strike benefits" were predicated on the need of the employee. However, the administrative law judge additionally found that "the payment of strike benefits was not keyed to picketing alone" and that "to qualify for these benefits the discriminatees were required to do some picketing" (App. D, p. 19). Even though the judge necessarily found that these benefits were paid in part for picketing services rendered, he refused to treat them as income in any fashion or offset them in any amount from backpay. Although these strike payments were at least in part keyed to the obligation that accrued from the picketing services rendered by the employee, the judge's finding ultimately upheld by the Board directly contravened the express holding of *Gullett* which is that the discharge of *any* obligation removes the payment from the status of a collateral benefit.

In *Gullett* this Court established sensible guidelines for lower Courts and the Board in differentiating between collateral and direct strike benefits. Unfortunately, the various Circuits and the Board have confused the issue by their failure to apply the *Gullett* principles while paying lip service to *Gullett*. In these times of economic crisis when survival of many business enterprises is at stake, it is critical that the Court again consider the issue and clarify the application of the *Gullett* principles. Employers should not be made to bear the full burden of backpay when

payments made to striking employees by the union are based on both picketing services and employee need. Petitioner respectfully urges that when strike benefits are given partially for picketing services rendered, there should be a corresponding pro-rata diminution of backpay liability. The mere fact that the benefits are also keyed in part to something other than picketing should not deny the employer the protection of *Gullett*. Yet that is the necessary effect when the Board and the Courts of Appeals treat as fully collateral strike payments conditioned in part upon picketing.

The decision of the Court of Appeals below, that the Board's finding that the benefits received from the union during the strike were not earnings is supported by substantial evidence on the record, is without foundation given the entire record of this case. In order to receive benefits from the union, the employees had to picket on a regularly scheduled basis (R. 414, 925), and picketers could not have employment other than their picketing activities (R. 1251-53). Monetary payments from the union to the strikers ceased whenever the strikers stopped picketing (R. 39-40, 275, 1094). In the latter portion of the strike, picketers were paid additional sums in direct proportion to the additional hours that they actually picketed (R. 1245-49). To say that there was substantial evidence in the record to support a finding that the benefits were not earnings is to rely solely on the facts that the amount received partially depended on the employees' family status and that those employed

individuals who volunteered to man the picket line received no compensation. It is to overlook the overwhelming record evidence that the money received was at least in part *quid pro quo* for picketing services rendered and therefore interim earnings that should be offset against any gross backpay liability.

Petitioner respectfully requests that the Court review this decision in the light of *Gullett,* and decide whether a strike benefit based at least in part on performance of picketing services renders such payment partially direct rather than fully collateral and therefore requires a partial offset against backpay liability.

CONCLUSION

For the reasons set forth herein, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ALLEN W. TEAGLE,
WESLEY J. FASTIFF,
WILLIAM F. TERHEYDEN,
LITTLER, MENDELSON & FASTIFF,
Attorneys for Petitioner.

Dated, April 17, 1975.

(Appendices Follow)

Appendix A

In the United States Court of Appeals
for the Seventh Circuit

No. 74-1111

National Labor Relations Board,
Petitioner,
vs.
The Laidlaw Corporation,
Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board

ARGUED NOVEMBER 14, 1974—DECIDED DECEMBER 12, 1974

Before SWYGERT, *Chief Judge*, HASTINGS, *Senior Circuit Judge*, and FAIRCHILD, *Circuit Judge*.

PER CURIAM. The National Labor Relations Board seeks enforcement of its order directing respondent Laidlaw Corporation to pay a total of $99,621.67 in backpay to 48 named employees in varying amounts as determined by an administrative law judge after a backpay hearing. The hearing was made necessary by the fact that Laidlaw and the Board were unable to come to any informal agreement concerning the proper backpay awards. We find the various awards made in

the Board's order to be supported by substantial evidence on the record as a whole and further find these awards to be in harmony with existing law. We therefore enforce the Board's order in all respects.

These awards grew out of a labor dispute which took place in 1966. As a result of that dispute unfair labor practice charges were filed against Laidlaw. On June 13, 1968 the Board issued a decision and order finding Laidlaw guilty of violations of sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.*, and ordering it to offer to certain named discriminatees immediate and full reinstatement to their former or substantially equivalent employee positions. *Laidlaw Corp.*, 171 NLRB 1366 (1968). It was further ordered that these employees be made whole for loss of pay resulting from the company's discrimination against them. *Id.* This Court issued an opinion and order on July 28, 1969 enforcing the Board's order in full. *Laidlaw Corp. v. NLRB*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970). Subsequent to our decision and order attempts were made to settle on an agreed backpay award for the various discriminatees. When these efforts proved fruitless, a backpay specification and notice of hearing was issued and a hearing had before an administrative law judge. His supplemental backpay decision was issued on November 28, 1973. The Board's decision and order adopted the administrative law judge's decision and order without modification. *Laidlaw Corp.*, 207 NLRB No. 94, 85 LRRM 1476 (1973).

Respondent Laidlaw first questions the validity and propriety of the original order for reinstatement and backpay. This question was settled in our previous opinion in this case, and we decline to reconsider our holdings in that opinion.

It is next contended that a strike settlement agreement reached in December of 1966 cut off backpay claims for all claimants not included on a list of 23 names given by the union to Laidlaw incident to that agreement. Laidlaw says that the list was represented by the union to contain the names of all employees seeking reinstatement and that this representation constituted a waiver of the reinstatement and backpay rights of all discriminatees not included on that list. The short answer to this contention is that the company had no right to bargain with the union using these employee rights for the ante. At the time of the settlement agreement the company was under a duty to make a *bona fide offer* of *full* reinstatement to each of the named discriminatees. Until such an offer was made, these rights could not be waived. *Heinrich Motors, Inc.*, 166 NLRB 783 (1967), *enforced*, 403 F.2d 145 (1968). It is clear that the company never intended to make a general offer of reinstatement at the time of the settlement agreement, and in fact this is admitted by Laidlaw in its brief to this Court:

> Thus the Company was thoroughly justified in relying upon the Union's representations that only twenty-three of the strikers desired to return to work. But for those representations, the Company would not have agreed to settle the strike to reinstate the twenty-three strikers, or to enter

> into a new and more costly agreement when it was under no obligation to do so.
> Respondent's brief at 19.

Furthermore, Laidlaw failed to offer full and unconditional reinstatement even to the employees named on the list, but instead took these employees back as "new hires" without seniority benefits of any kind. Thus, even accepting Laidlaw's contention that the union list represented all discriminatees desiring to accept the company's offer, the fact remains that the offer "made" was not the offer to which these people were entitled. A refusal of an offer of partial reinstatement does not waive a discriminatee's right to full reinstatement.

Laidlaw also challenges the Board's refusal to deduct from the backpay awards sums received from the union, allegedly for picketing. The record shows, however, that monies disbursed by the union were not contingent on picketing time, but were in fact based on need and family situation. Moreover, those who were employed and who continued to man the picket lines did not receive any strike benefits, consistent with the "need" criteria used to disburse these benefits. Clearly, then, the Board's finding that the benefits received from the union during the strike were *not* earnings is supported by substantial evidence on the record.

Finally, respondent claims that certain of the discriminatees failed to make a diligent search for employment as required and that the backpay awards for these employees should be reduced accordingly.

Our review of the record shows, however, that the administrative law judge made a careful evaluation of the evidence on this point and that his findings as to each discriminatee are fully supported on the record.

The order of the Board will therefore be

ENFORCED.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

Appendix B

United States Court of Appeals
for the Seventh Circuit

No. 74-1111

National Labor Relations Board,
Petitioner,

vs.

The Laidlaw Corporation,
Respondent.

[January 22, 1975]

JUDGMENT

Before: Swygert, Chief Judge, Hastings, Senior Circuit Judge, and Fairchild, Circuit Judge.

This Cause came on to be heard upon an application of the National Labor Relations Board for the enforcement of a certain order issued by it against Respondent, The Laidlaw Corporation, its officers, agents, successors and assigns on November 28, 1973. The Court heard argument of respective counsel on November 14, 1974, and has considered the briefs and transcript of the record filed in this cause. On December 12, 1974, the Court being fully advised in the premises, handed down its opinion granting enforcement of the Board's order.

On Consideration Whereof, it is ordered and adjudged by the United States Court of Appeals for

the Seventh Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Respondent, The Laidlaw Corporation, its officers, agents, successors and assigns abide by and perform the directions of the Board in said order contained.

It Is Further Ordered And Adjudged by the Court that costs shall be taxed against the Respondent.

/s/ L. M. Swygert
Judge, United States Court of
Appeals for the Seventh Circuit

/s/ John S. Hastings
Judge, United States Court of
Appeals for the Seventh Circuit

/s/ Thomas E. Fairchild
Judge, United States Court of
Appeals for the Seventh Circuit

A True Copy:
Teste:

/s/ Thomas F. Strubbe
Clerk of the United States
Court of Appeals for the
Seventh Circuit.

by Mary Ann Ciatey,
Deputy Clerk

Appendix C

[Dated 11/28/73] [D—8169 Peru, Ind.]

United States of America
Before The National Labor Relations Board

The Laidlaw Corporation and Local 681, International Brotherhood of Pulp, Sulphite and Paper Mill Workers, AFL-CIO	Cases 25-CA-2399 25-CA-2450

DECISION AND ORDER

On June 29, 1973, Administrative Law Judge Paul E. Weil issued the attached Supplemental Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and Counsel for the General Counsel filed a brief in support of the Administrative Law Judge's Supplemental Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Supplemental Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.[1]

[1]Respondent's request for oral argument is hereby denied since the record, the exceptions, and the briefs adequately present the issues and positions of the parties.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Respondent, the Laidlaw Corporation, Peru, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. November 28, 1973

.....
Edward B. Miller, Chairman

.....
John H. Fanning, Member

.....
Howard Jenkins, Jr., Member

(Seal) National Labor Relations Board

Appendix D

[Dated 6/29/73] [JD-402-73 Peru, Ind.]

United States of America
Before The National Labor Relations Board

Division of Judges, Washington, D.C.

The Laidlaw Corporation and Local 681, International Brotherhood of Pulp, Sulphite and Paper Mill Workers, AFL-CIO	Cases 25-CA-2399 25-CA-2450

SUPPLEMENTAL DECISION

Statement of the Case

PAUL E. WEIL, Administrative Law Judge: On June 13, 1968, the National Labor Relations Board, hereinafter called the Board, issued its Decision and Order directing the Laidlaw Corporation, hereinafter called the Respondent, to reinstate and make whole certain employees of Respondent for any loss of earnings suffered by reason of its discrimination against them. On July 28, 1969, the Court of Appeals for the Seventh Circuit entered its judgment enforcing the Board's order. The parties having then been unable to agree upon the amount of backpay due certain discriminatees, the Regional Director of the Board for Region 25 issued a Backpay Specification and Notice of Hearing and an amendment thereto, each of which were duly answered by Respondent; by denying certain allegations in the backpay specification denying as to each of the discriminatees involved

therein that he or she was due the backpay recited in the specifications, and generally denying as to all of the discriminatees that any backpay was due after a certain strike settlement agreement was entered into on December 12, 1966. On the issues thus joined the matter came on for hearing before me at Peru, Indiana, on February 21, 1973, and continued until March 6, 1973. During the course of the hearing an issue arose concerning vacation pay allegedly denied certain discriminatees after their reinstatement by Respondent and I permitted the General Counsel to further amend the backpay specification to include a claim therefor. Subsequent to the close of the hearing a joint exhibit, which I hereby receive in evidence, had been received from the General Counsel and Respondent, setting forth agreed-upon amounts of backpay in the event that it is determined that vacation benefits were denied the rehired discriminatees.

All parties were present and represented at the hearing and had an opportunity to call and examine witnesses and to introduce relevant and material evidence. After the close of the hearing the General Counsel and Respondent filed briefs. On the entire record in this matter and in consideration of the briefs I make the following:

Findings and Conclusions

I. The Threshold Issues

A. *The Strike Settlement Agreement*

Respondent contends that on December 12, 1966, it entered into a strike settlement agreement with the

Union, pursuant to which reinstatement was offered 23 discriminatees and all other discriminatees thereby waived reinstatement and subsequent backpay. The evidence upon which Respondent's contention is based is, in part, sharply contradicted by evidence adduced by the General Counsel. In brief the circumstances are these.

In late November 1966, the strike[1] was still in existence. Most of the striking employees had found interim employment, some were removed from the labor market for various reasons and some 23 of the employees continued full time around-the-clock picketing of Respondent's plant in Peru, Indiana.

Representatives of Respondent, Personnel Director Holloway, and Plant Manager Keene, both of whom were newly arrived on the scene, met with representatives of the Union, Wentz and Taylor, and discussed ending the strike and resolving the differences between them. Holloway, the spokesman for Respondent, declined to discuss resolution of the issues involved in the instant unfair labor practice charges but offered to explore whether the strike could be ended by rehiring some of the striking employees and negotiating a new contract. At this point the credibility issue arises, Holloway testified that he urged the Union to give him a list of all employees who sought reinstatement and Respondent would determine whether it could hire them. Wentz testified that no request was made for a list of all employees who

[1]Details concerning the strike and the nature thereof are set forth in the Board's initial decision in this matter and will not be repeated herein.

sought reinstatement but rather that the Union offered a list of all discriminatees who were still involved in the strike, i.e., the 23 discriminatees who were then manning the picket line. At any rate, the Union presented a strike settlement agreement, negotiations took place, Respondent agreed to rehire the 23 named employees. The employees were not reinstated but returned as new hires without seniority benefits of any kind. Then the Union attempted during negotiations to include a 24th employee, Dorothy Scotten, who had lost her interim employment apparently during the negotiations. Respondent declined to consider her but stated that if any experienced employees wanted to work for Respondent they could file applications as new employees.

On the above facts Respondent contends that it has fulfilled its duty of offering reinstatement to all the discriminatees inasmuch as the Union, as their agent, in presenting a list of 23 discriminatees desiring reinstatement thereby implicitly waived reinstatement as to all others.

This issue is scarcely one of first impressions. The Board's rule under these circumstances was quite recently set forth in its decision in *Heinrich Motors, Inc.*, 166 NLRB 783, in which the following statement appears.

> Section 10(c) of the Act expressly empowers the Board to order "reinstatement of employees with . . . backpay;" and as the Supreme Court has noted, "reinstatement is the conventional correction for discriminatory discharges." Thus, our remedial order in this case provides that Re-

spondent must offer Cira reinstatement and make him whole for any loss of earnings suffered until the offer of reinstatement is made. The fact that a remedial offer of reinstatement may be declined, particularly where, as here, it is made long after the discriminatory discharge, does not diminish the importance of the offer in our remedial scheme. Reinstatement is basic to our remedy here, for "to limit the significance of discrimination merely to questions of monetary loss to workers would thwart the central purpose of the Act." Respondent's offer of reinstatement was required to comply with our order and to remedy its discrimination by demonstrating to employees that their rights will be vindicated. To toll Respondent's backpay obligation prior to its offer in September 1965 would eliminate the practical incentive for compliance with our order.

We note initially that a statement by Cira to Dishner (a Board agent) that reinstatement was not desired, could not be relevant to indicate a willfull loss of earnings. Furthermore, Respondent does not suggest that its backpay obligation should be tolled because it relied in any way upon Cira's statement and delayed its offer of reinstatement. Indeed, there is no suggestion that such statement ever came to Respondent's attention.

As to whether Cira's alleged statement to Dishner would constitute a waiver of his right to reinstatement, we consider it clear that such a statement prior to Respondent's offer could not manifest "an unequivocal resolve not to accept reinstatement." Both in order to preserve the public interest in Respondent's meaningful compliance with our order and to safeguard a

discriminatee's rights, we consistently have discounted statements, prior to a good-faith offer of reinstatement, indicating unwillingness to accept reinstatement. [Citing, e.g., *Leeding Sales Corp.*, 155 NLRB 755; *Hatch Chevrolet,* 136 NLRB 284, 293; *Borg-Warner Controls,* 128 NLRB 1035, 1044; *Burnap & Sims, Inc.,* 157 NLRB 366.] We are mindful of the fact that such statements may reflect only a momentary state of mind that is subject to change; prior to an offer of reinstatement, such statements are in the nature of answers to a hypothetical question; and the discriminatees expression "may have been made in the heat of dissatisfaction with his treatment by Respondent."

In the instant case, assuming the facts as Respondent would have them, Respondent does not contend that it offered reinstatement to any employee in 1966. On the contrary, at that time it contended that the issues were before the Board and it preferred to leave them that way. The "offer" if such it could be considered, was to attempt to end the strike, if putting strikers back to work could do it. Respondent admittedly was not prepared to put all strikers back to work and, before it entered into negotiation as to putting any back to work, it demanded a list of all strikers whose rehire was then actively sought by the Union. Even assuming that the Union assured Respondent at that time that the 23 named employees were the only discriminatees that sought reinstatement, under the rule quoted above, the Board's order is not fulfilled nor is a waiver either of future reinstatement or backpay affected. Accordingly, I reject Respondent's threshold

contention and I find that the strike settlement agreement does not toll backpay for any of the employees involved herein except that the earnings of the employees who were rehired pursuant to the strike settlement agreement, mitigated Respondent's backpay liability.

B. *The Termination Pay*

When Respondent closed its Peru, Indiana, plant, in January 1973, after negotiation with the Union, it paid to its employees termination pay totaling in excess of $30,000.[2] Respondent contends that this payment of termination pay to employees, including some of the employees involved herein, should serve somehow to mitigate its liability for backpay. Respondent's counsel admitted at the hearing that there was no evidence that during the negotiations over severance pay either party discussed or considered the severance pay as an offset to Respondent's liability in this proceeding. Nevertheless Respondent contends that backpay under these circumstances comprises a windfall payment to the employees who received termination pay and should therefore be disallowed. Initially it should be noted that backpay is by no means a windfall. On the contrary, the backpay awarded as a result of this hearing represents an effort on the part of the Board, sanctioned by the courts, to restore the *status quo ante* that would have existed but for the unfair labor practices of Respond-

[2] With few exceptions the individual employees received less than $500.

ent, insofar as possible, and to effectuate the public purpose of ensuring to employees that they shall be made whole for the financial harm resulting from an employer's unfair labor practices. The only extent to which payment could be called a windfall is that the employees, having somehow managed to tighten their belts and survive the discrimination practiced against them, now may have an opportunity to recoup therefrom.

Respondent points to no authority for the proposition, which it vigorously espoused, at the hearing nor do I know of any. I find that the payment of severance pay by Respondent to certain of the employees involved herein does not operate as an offset to Respondent's liability.

C. *Strike Benefits*

Respondent contends that gross backpay during the time between February 12 and the first employment procured should be mitigated by the amount strikers were paid by the Union during that period, arguing that the strike benefits were "earnings" to the striker. Respondent argues that the strike benefits are not indeed strike benefits within the normal usage of the term because employees were paid only during a period of time they picketed and they received additional strike benefits as a consequence of picketing additional periods of time. The record reveals that strike benefits were paid on the basis of the striker's family situation, i.e., the head of the household received greater strike benefits than a single person and addi-

tional benefits[3] were paid for each dependent of the striker. The picketing requirements were not absolute, discriminatees were not "docked" if they missed a picketing assignment by reason of illness or necessary unavailability and were permitted to exchange their hours of picketing among themselves. The striker who could not walk picket during an assigned period of time was expected to secure a replacement, in some instances discriminatees who were employed continued to walk picket for a period of time but received no payment. In two cases benefits were continued for hospitalized strikers. Strike benefit allotments were available only to unemployed strikers. Apparently commencing May 29, 1966, additional amounts were afforded pickets based on the number of shifts of picket duty for gasoline, taxi fare, babysitters, coffee etc. Under the reimbursement schedule published effective that date, pickets who worked at least three shifts received $6 additional a week, those who worked four shifts of picket duty, $9 a week and those who worked five shifts of picket duty, $12 a week.

As Judge Ross stated in his decision in *Rice Lake Creamery Company,* 151 NLRB 1113, 1131:

> The legal principles involved are well established. If the strike benefits received by the discriminatees constitute wages or earnings resulting from interim employment they are proper deductions for gross pay, if these sums represent collateral benefits flowing from the association of the discriminatees with their union, then these

[3]Two dollars a week.

> sums are not deductible. The burden of proving that the strike benefits constituted wages for picketing and thus were in the nature of interim earnings was on Respondent.

Here the record shows that the payment of strike benefits was not keyed to picketing alone. To qualify for these benefits the discriminatees were required to do some picketing but the benefits themselves were predicated on the need of the employee rather than on the amount of picketing performed. The additional sums for reimbursement do not substantially change the picture. It is notable that the reimbursement policy was instituted at about the time school recessed for the summer and pickets would normally be faced with additional expenses of child care. Also by this time many of the strikers to whom transportation was available through automobile ownership had secured other employment and the pickets would inferably frequently be required to find other transportation to the plant for picketing purposes. All in all I find that the additional payment to reimburse employees for these and other expenses, in the light of the low income the discriminatees had from the direct strike benefits, are not such changes in the benefit procedure as to constitute them as interim earnings.

D. *The Basic Backpay Formula*

The formula under which the backpay was computed for purposes of the backpay specification was based on a determination of the average hours worked by a representative group of employees employed during

the backpay period in each of the departments of Respondent's Peru, Indiana, plant in which discriminatees had worked, omitting the hours of employees who worked less than 24 hours a week unless it appeared that the entire department worked shortened hours in any particular weekly period. The quarterly gross backpay for each discriminatee was determined by multiplying the adjusted average hours applicable to the backpay period of each discriminatee by the wage rates he would have received during such backpay period.

Respondent admitted the propriety of the General Counsel's method of computation and admitted the beginning and end of the backpay period except for its contention that the backpay of all employees should not continue beyond December 12, 1966, but contended generally, as to each, that it lacked sufficient knowledge to admit or deny material allegations regarding each discriminatee and stated that it had no knowledge regarding the interim employment earnings and expense allegations concerning each discriminatee. In this state of the pleadings I accept the computation of General Counsel except to the extent that I credit evidence adduced during the hearing either by the General Counsel or Respondent changing the total computation. The General Counsel made available at the hearing and called to the witness stand 40 of the discriminatees. Three who had no backpay due them were not called, two were deceased and the parties reached agreement on the backpay figure for six employees who did not testify at the hearing for various reasons. Accordingly, none of the 51 persons named

in the backpay specifications are unaccounted for. At this point it appears appropriate to consider the backpay of the individual employees.

Before considering each case on its individual merits, I have considered generally, on the issue of availability of desirable alternative employment, the nature of the employment market in that part of Indiana in which Respondent's plant was located. As an aid to such consideration Respondent produced a letter from the chief of research of the Indiana Employment Security Division addressed to the manager of the Indiana State Employment Service in Peru, Indiana, showing that the Miami county unemployment rate for the year 1966 averaged 3.4 percent as against the United States average of 3.8 percent, in 1967 in Miami county the lowest rate was in the month of October, 2.9 percent, the highest rate in June, 5.2 percent with the average of the four bimonthly figures approximately 3.6 percent, in 1968 the low was in December, 1.7 percent, the high in February, 4.1 percent and the intervening months averaged out at approximately 2.9 percent.[4] From these figures I can find only that there was substantial but not alarmingly high unemployment in Miami county throughout the backpay period.

Perhaps a better indication of the employment situation is to be found in a sheaf of (sometimes illegi-

[4]The information cited *infra* in Chief of Research Kelly's letter was allegedly derived from *Employment and Earnings*, a publication of the U.S. Department of Labor, Bureau of Labor Statistics; the Indiana rates from the Indiana Employment Security Division and the county rates from the Indiana work force summaries for the year of reference.

ble) photocopies of the employment advertisements in the Peru Tribune covering a part of the backpay period. These indicate, in summary, that with the exception of advertisements by Respondent for employees and advertisements by Radio Corporation of America for openings in production work at Marion, Indiana, which appears to be located some 34 miles from Peru, there was no regular labor market available for the type of employees represented among the discriminatees. Frequent ads appeared for babysitters, part-time door-to-door salespeople, experienced automobile mechanics and electronic technicians and other skilled trades. Occasional ads appeared for grocery clerks in Peru but by and large the papers reveal little market for the production, assembly and shipping capabilities of most of the discriminatees.

Finally the Respondent adduced a copy of a booklet published by the Chamber of Commerce of Peru entitled Manufacturers Directory of Peru, Indiana, purportedly listing the Peru area manufacturers. Perusal of its contents reveals that in addition to manufacturers the booklet lists other types of enterprises including railways, the public service company, newspapers, printing press, dairies and apparently some distribution facilities. The booklet is dated May 1, 1965, which date has been struck out and February 1, 1966, stamped above it. There is no telling as of what time the various enterprises listed therein did business in Peru or whether they used employees with the competence of the discriminatees herein. The fact that almost none of the enterprises listed in the booklet appear to have advertised in the newspapers for

help leads one to suspect that they did not supply a particularly fertile field for job hunting.

Almost without exception the discriminatees registered at the Peru office of the Indiana State Employment Security Division. It is notable that this division advertised occasionally in the newspaper for employees but with one or two exceptions, noted below, no discriminatee appears at any time to have been offered any employment by that office. Whether this resulted from discrimination by that office against this particular group of employees, based on the expressed wishes of the employers who use that office to recruit help, does not appear. Most of the discriminatees drew unemployment security which necessitated regular reporting on their part to the office of the Indiana State Employment Security Division where they were required to affirm their continuing availability for employment and at which time presumably the unemployment office would have offered them whatever employment was available. The failure of that office to offer the discriminatees employment would seem to substantiate the testimony of those employees who had difficulty finding employment during the backpay period.

Respondent produced no specific evidence other than that detailed above, and that derived from vigorous cross-examination of the discriminatees. Respondent seems to contend that if there is any hiatus of information concerning interim earnings or expenses, or if, for reasons of failure of memory or failure by the discriminatee to keep records satisfactory to Respondent, or the giving of incredible testimony by a

discriminatee, it has a right to expect a diminution of backpay. Respondent apparently misconceives its burden herein to show, by a preponderance of the evidence, whatever mitigating circumstances exist. With the exception of a bundle of unassimilated newspaper advertisement and a letter from the state authorities concerning the relative level of unemployment in Peru, Respondent produced no evidence of any employment available to any discriminatee, nor of the willful failure of any to accept such employment. Where records exist, such as hospital records, employment office records, earnings records and the like, Respondent made no apparent effort to secure them. It is not enough that Respondent thinks that employees should have been able to secure jobs. Suspicion and surmise are no more valid bases for decision in a backpay hearing than in an unfair labor practice hearing, and I decline to indulge in them.

With all these facts in mind it is time to discuss the individual discriminatees' backpay.

At the end of the hearing the parties stipulated on the net backpay figure for the following employees:

Eiko Oldham	$ 411.42
Diane M. Bakke	$ 300.00
Mildred J. Glaze	$1,850.00
William Massey	$1,450.00
Patricia Viertel[5]	$ 750.00
Earlene Watson	$1,131.53

[5]Viertel's name is misspelled in the transcript as Bartel. However the surrounding circumstances leave no doubt that Partricia Viertel was the person in the contemplation of the stipulation.

Richard Achey

Richard Achey's backpay period begins February 17, 1966, and ends January 13, 1969, when he died. His mother appeared at the hearing and testified that during the backpay period her son lived with her with his two children, that she accompanied her son to various employers where he sought work, that she called Respondent on various occasions seeking to have him recalled there without success, that she accompanied him to the unemployment security office on various occasions and that she made a good-faith effort to seek employment. His brother testified to Richard's search for employment before March 28, 1966, where the two brothers sought work together. The social security report for Richard Achey reveals that he worked at a number of places during all but the first quarter of the backpay period with brief periods if any between his employment at the various jobs he held. Respondent adduced no evidence that Richard Achey at any time withheld his services or failed to seek employment. On the contrary it appears that he sought and found employment rather successfully. Accordingly I shall recommend the award of backpay in accordance with the specification as amended at the hearing.

Stephen Achey

Stephen Achey's backpay period begins February 12, 1966, and ends on January 11, 1967, when he was rehired by Respondent, he was unemployed during the first calendar quarter from February 12 through

March 1966. On March 28, 1966, he was called to active duty as a member of the National Guard and remained on active duty until August 5, 1966. He returned to Peru at that time and continued his search for employment, ultimately finding employment a week or so later at a local manufacturing concern which he left on his doctor's orders because he was suffering from lung trouble from fumes from a plastic process used at that employer. Shortly thereafter he got a job at another manufacturing company where he worked until he was rehired at Respondent's plant on January 11. Respondent adduced no evidence that Stephen Achey did not make a good-faith effort to find interim employment or failed to the best of his ability to mitigate backpay herein. Respondent contends that he should have been able to find work during the first quarter before he went into the National Guard encampment, however, this is no evidence that his search for work was less than thorough. I conclude that Stephen Achey should be awarded backpay in accordance with the specifications.

Mary Barnhill

Mary Barnhill's backpay period begins February 12, 1966. She was offered reinstatement on November 16 by Respondent and the backpay period ends at that time. However, with the exception of the first and second quarter of 1966 and the last quarter of 1969 Mrs. Barnhill had no net backpay because her interim earnings included her gross backpay. During the first quarter of 1966 Mrs. Barnhill sought work at various places and registered for unemployment compensa-

tion. She also picketed, normally about 12 hours a week.

I find that the Respondent has not sustained its burden of proof that Mrs. Barnhill failed in mitigating the backpay as set forth in the specification. Accordingly I shall recommend that she be paid in accordance therewith.

Norma Black

Mrs. Black's backpay period ended on December 27, 1966, when she returned to work at Respondent's plant. Although the record reveals that she sought employment and filed applications with various employers in and around Peru, she secured no employment until recalled by Respondent. Respondent, aside from its basic contention that she should have been able to find a job from which it would have me infer that she did not make an honest attempt to do so, adduced no evidence that she deliberately failed to mitigate the backpay or to search for interim employment. I conclude therefore that backpay should be paid her in accordance with the backpay specification and I so order.

Clara Blackmon

Clara Blackmon's situation is exactly the same as that of Norma Black except that she returned to Respondent's employ on December 19, 1966. She had no interim earnings, she applied regularly to the Peru office of the Indian Employment Security Division but was never referred to any job thereby, she sought work at the plants of many local and nearby employers with-

out success. Respondent adduced no evidence that the search for employment had been anything but thorough. Accordingly I recommended that she paid backpay on the basis set forth in the backpay specification.

Myra Bowman Michael

Mrs. Michael was recalled to Respondent's employ on December 12, 1966. Although she registered for unemployment compensation, and received it, and searched for employment, she found none. Respondent made no showing that her failure to find interim employment was deliberate. Accordingly I recommend that she be paid backpay in the amount set forth in the backpay specification.[6]

Polly Bowman

Polly Bowman's backpay period ends with her recall to Respondent's employment on December 14, 1966. Between the commencement of the backpay period, February 12, 1966, and October 10 she was unemployed. She commenced work on that date at a nearby plant. The General Counsel concedes that the interim earnings for that quarter were $580 less $24

[6]Respondent adduced on cross-examination the fact that Mrs. Michael had not applied for employment at a certain local plant. She explained that other discriminatees had applied there and had not been permitted to file applications since they were not hiring. This phenomenon obviously occurred frequently; the striking employees were in close association with one another and were usually well informed as to which employer would accept applications at any given time, thus it is quite possible and I do not doubt that it occurred that discriminatees who were anxious to find employment would nonetheless make few calls for that purpose knowing that most of the specific employers were not hiring.

attributable to the additional expense of driving to a nearby town, Wabash, Indiana, leaving a total of $556 interim earnings for the fourth quarter of 1966. The Respondent presented no evidence of any failure on Mrs. Bowman's part to seek employment or otherwise mitigate the backpay liability. Accordingly I shall recommend that she be compensated in accordance with the backpay specifications.[7]

Rhea Bowman

Rhea Bowman's backpay ends December 12, 1966, when she returned to work at Respondent's plant. During the entire backpay period Mrs. Bowman was unemployed. She testified that she registered at the Indiana State Employment Security Office in Peru immediately after her termination, but was never sent to any job that she hunted assiduously for work without success. Respondent adduced no evidence that her search for employment was other than intensive or that she deliberately incurred liability. I recommend that backpay be paid her in accordance with the specifications.

Christine (Brown) Asberry

Christine Brown Asberry's backpay period ends November 11, 1969, when Respondent offered her employment. Christine Brown Asberry's backpay period

[7]The backpay specifications were amended at the hearing to reduce the net interim earnings of Mrs. Bowman as a consequence of her having continued her interim employment for 2 weeks after she commenced work when recalled by Respondent. I agree with the General Counsel that Respondent deserves no mitigation of backpay by the earnings of Mrs. Bowman while she was working two jobs.

begins February 12, 1966. The General Counsel contends that it ends November 11, 1969, when Respondent offered her employment. The record reveals that Mrs. Asberry was employed almost immediately after her termination in February by a plastics factory at which she worked for 3 or 4 weeks and found that she could not keep up with the speed of production at the plastic press at which she was employed and that the smell of the melting and sometimes burning plastics made her ill. Accordingly, she quit her employment and sought another job which she found within a week or two in a neighboring town. To reach this job she was required to ride with a fellow employee for "3 or 4 months" to whom she paid $4 a week for transportation, thereafter she rode with another employee to whom she paid $5 a week. The General Counsel has listed as expenses deducted from interim earnings $5 for each week. Accordingly, I have reduced the expenses for the second and third quarter of 1966 to $12 and $52 respectively rather than $15 and $65 respectively.

Mrs. Asberry continued to work at interim employment into the first quarter of 1967 when her brother died and she left her job to go to Florida. While in Florida she became pregnant and remained out of the labor market until February 19, 1968, at which time she sought and secured employment at Friendly Nursing Home. The General Counsel in the backpay specifications computed gross backpay in the first quarter of 1968 only for the month of March 1968 ignoring the period between February 19 and March 1, 1968,

but the net interim earnings reported were for the entire period for February 19 to March 31. I don't conceive this to be a valid deduction, unless gross backpay is included for the period between February 19 and March 1, 1968, during which period Mrs. Asberry obviously was in the labor market. I shall therefore increase gross backpay for the quarter by nine additional working days, to a totol of $393.49. In addition Mrs. Asberry was required to buy five uniforms at approximately $5 apiece to take the employment at the nursing home. These uniforms constitute an expense of $25 which is to be deducted from the interim earnings, leaving net interim earnings for the first quarter of 1968 of $193.76. Since her earnings for the first quarter of 1968 would have been $393.49 her net backpay for that quarter becomes $199.73.

While Mrs. Asberry was employed at the Friendly Nursing Home she again became pregnant and left the labor market in the third quarter of 1968. While she was out of the labor market she moved to Florida and after she had recovered from the birth of her second child went back to work there, making no further effort to seek employment in the Peru area. In November 1969, she was offered reinstatement by Respondent and although unemployed at the time did not accept the offer. She testified that she moved to Florida in order to be near her relatives. I conclude that she thus removed herself from the labor market and that backpay is accordingly tolled with the commencement of the third quarter of 1968. I shall therefore recommend that Mrs. Asberry be paid backpay as set forth in the specifications amended herein, as I

have set forth above through the second quarter of 1968 after which she earned no backpay.[8]

Nanola Browning

Nanola Browning's backpay period ends November 16, 1969, when Respondent offered her a job. Mrs. Browning was pregnant at the time the strike started and because she believed that employers would not hire her because she was pregnant she made no attempt to find employment. The baby was born in September 1966 and she commenced seeking work the last of October. Accordingly I find that she took herself out of the labor market from the commencement of the backpay period until November 1, 1966. The General Counsel contends that she had gross and net backpay in the first quarter of $360.58. I reject his contention and find that she had no backpay for that quarter.

Commencing November 1, Mrs. Browning made an intensive search for employment and found a job in the first quarter of 1967, at which she was still employed when she was called back by Respondent, thus tolling the backpay. I note that the gross backpay alleged by the General Counsel for the fourth quarter of 1966 is $945.33, the same as the gross backpay alleged for other employees in the same work category as Mrs. Browning. Inasmuch as she was out of the labor market for the first month of the quarter, I shall

[8] I make no further deductions from backpay for the cost to Mrs. Asberry of laundering her uniforms inasmuch as there is no showing that she would not have to launder whatever clothing she wore. The fact that her laundry included uniforms provided no additional expense of employment.

reduce the gross and net backpay for that quarter by one-third.

After her return to the labor market Mrs. Browning is not shown to have faltered in her effort to find employment and ultimately was employed in the first quarter of 1967, continuing in the same employment until the backpay period was tolled by Respondent's job offer on November 16, 1969. With the exception of the reduction set forth above in the calendar year 1966, I recommended that she be recompensed as set forth in the backpay specifications, as amended.[9]

Dorothy A. Cain

Dorothy Cain's backpay period ends February 14, 1967, when she returned to work at Respondent's plant. Dorothy Cain provides the exception that proves the rule; the Unemployment Security Division referred her to a job. Before she had been employed by Respondent she had worked for a restaurant and when she registered with the Unemployment Security Division the successor-owner of the restaurant asked the Employment Security Division to refer her to employment with them. However they offered only 90 cents an hour which Mrs. Cain determined was not enough to warrant taking the job. Accordingly she sought elsewhere for work and found employment at a cleaning establishment at $1 an hour where she continued to work until she was recalled by Respondent.

[9]Mistakes in the computations set forth in the backpay specifications for the third quarter of 1968 and the second quarter of 1969 were amended at the hearing.

While it is sometimes necessary that an employee lower his sights in seeking interim employment, I find no warrant in the instant case in denying Mrs. Cain any part of her backpay because of her refusal to take the job at 90 cents an hour, an amount which would scarcely have compensated her for the cost encountered on her transportation from Chili, Indiana, where she lived, to Peru where the combination grocery store and restaurant was located. I find that she made a good-faith effort to find interim employment and agree with the General Counsel that she should be awarded backpay in the amount set forth in the backpay specifications, as amended at the hearing.[10]

Betty Crippen

Betty Crippen's backpay period ends December 14, 1966, when she returned to Respondent's employ. During the backpay period Mrs. Crippen had no interim employment. The record reveals that she registered with the Unemployment Security Division and reported there regularly and that she applied for employment at most of the plants in and around Peru where other discriminatees sought and sometimes found employment. There is no evidence that she deliberately withheld her services or failed to mitigate backpay. I recommended that she be paid in ac-

[10]The record reveals that in addition to the second quarter earnings and thereafter attributed to the dry cleaners employment, Mrs. Cain earned $79 in the first quarter. These interim earnings $2.90 expended at the rate of 10 cents per mile for 29 miles in seeking employment during the first quarter should be deducted from the gross backpay for the first quarter of 1966.

cordance with the net backpay set forth in the specifications.

Martha Dalton

Martha Dalton's backpay period ends April 1, 1967, when she left the labor market. Mrs. Dalton's husband was stationed at an Air Force base near Peru, Indiana, and was ordered to Southeast Asia, at which time Mrs. Dalton being unable to support herself and her daughter with her husband overseas and without a job moved to Central City, Kentucky, to be with her parents during her husband's absence. After she reached Central City, Kentucky, she resumed her search for employment without success. In July she notified the Respondent of her move but was not thereafter called back to work by Respondent. On April 1, 1967, her husband returned and was assigned to a base in Florida where she moved to be with him, thus taking herself out of the labor market. I conclude that Mrs. Dalton under the peculiar circumstances of her case does not relinquish her right to backpay by reason of her move to Kentucky. She testified that if she had employment in Peru she would have stayed there but could not afford to do so without employment. But for the discrimination she would have been employed by Respondent and presumably would have stayed there until 1967 when her husband returned to this country. Accordingly I recommend that she be paid backpay in accordance with the backpay specification. Prior to the departure of her husband, she took a 2-week leave during the course of which her husband moved her to her parent's home.

Respondent contends that she was out of the labor market during that period of time. However, Respondent made no showing that if she had been employed by Respondent at that time she would have taken a vacation or for that matter her husband would have taken leave for that purpose. Accordingly I find that Respondent has not supported its contention with substantial evidence and I reject it.

Virginia Durham

Virginia Durham's backpay period ends December 15, 1966, when she returned to Respondent's employ. Mrs. Durham secured no employment during the year 1966 and accordingly had no interim earnings. There is no evidence that Mrs. Durham did not make a good-faith attempt to find employment, she registered at the unemployment security office and called on all of the usual employers in the vicinity in an attempt to find employment. Accordingly I recommend that she be paid backpay in accordance with the specification.

Dovie Fisher

Dovie Fisher's backpay ends December 20, 1966, when she returned to Laidlaw. During the year 1966, Mrs. Fisher had no interim employment and accordingly no interim earnings. Mrs. Fisher testified that she made no effort to find employment until May because she did not think the strike would last that long and thought that she would go back to work. Commencing in May however she applied at various other employers and appears to have made a good-faith attempt to seek employment. Accordingly, I shall reduce

gross backpay for the period February 12 through April 30, 1966. This backpay for the first quarter is wiped out completely and the backpay for the second quarter is reduced from $741.97 by $233.66 to $508.31. I recommend that she be reimbursed in accordance with the backpay specification for the third and fourth quarter of 1966.

Marjorie Flitcraft

Marjorie Flitcraft's backpay period ends November 11, 1969, when she was offered employment by Respondent. Mrs. Flitcraft registered at the unemployment security office promptly and appears to have made a good-faith effort to seek employment. She found employment in the second quarter of 1966 and continued in the same job from then until backpay was tolled by Respondent's offer of the job.

Respondent contends that because Mrs. Flitcraft took a vacation in 1967, 1968 and 1969, gross backpay should be reduced for those periods. However, it appears that the interim employer paid her vacation pay and accordingly no mitigation of backpay should result therefrom. Mrs. Flitcraft had transportation expenses from Peru, Indiana, where she lived, to Wabash, Indiana, where she found work. Mrs. Flitcraft testified that at all times she had at least one passenger riding with her who paid $3 a week towards the expenses and that her expenses, aside from wear and tear on the car, consisted of $8 a week for gasoline. Mrs. Flitcraft testified that in addition to the one rider who always paid her $3 a week she had another one about half the time who paid a similar sum.

The General Counsel claims $3 per week through the entire backpay period for transportation expenses. Inasmuch as Mrs. Flitcraft's computation of $8 a week takes into account no depreciation on the car, no expense for oil, lubrication, tires, batteries, etc., but only the out-of-pocket expense for gasoline, and inasmuch as the record reveals the distance to Wabash from Peru is 16 miles, which multiplied by five round trips would be 160 miles which would normally be computated at the rate of 10 cents a mile, I believe that the General Counsel's offset of $3 a week is minimal and should be allowed. In addition the General Counsel claims as an offset $7.60 for travel of 76 miles at 10 cents a mile searching for work in the second quarter. I believe this is a reasonable offset and should be allowed. As a consequence I shall recommend that Mrs. Flitcraft be recompensed in accordance with the backpay specification.[11]

Garnet Good

Garnet Good's backpay ends June 13, 1970, when she voluntarily removed herself from the labor market. Mrs. Good testified that on or about November 13, 1969, she received a letter offering her reemployment with Respondent. She immediately telephoned the plant of Respondent and informed the person who answered the telephone, a female, that she had received a letter and wanted to claim her job. The person who answered stated that there were no jobs available, whereupon Mrs. Good asked to speak to Mr.

[11]It may be noted that Mrs. Flitcraft's interim earnings exceeded her gross backpay in 11 of the 16 quarters.

Brown, the plant manager who had signed the November 11 letter. The person who answered the telephone stated that Mr. Brown was in conference and did not have time for her and broke the connection. The following Friday, Mrs. Good made a similar telephone call with similar response. Respondent contends that in the absence of identification of the person to whom Mrs. Good spoke, Mrs. Good's evidence is not sufficient to continue Respondent's liability for backpay after the November 11, 1969, date. The evidentiary rule as I understand it is that when a person places himself in connection with the telephone system through an instrument in his office he thereby invites communication in relation to his business through that channel, and conversations held over such telephone in relation to his business carried on there are admissible, even where the voice on the telephone is not identified. Respondent made no effort to rebut Mrs. Good's testimony and I credit it. I conceive that it is Respondent's responsibility that the person who answers his business telephone speak authoritatively or not at all and I find that the response to Mrs. Good's inquiry constitutes a rejection of her attempt to "claim" her job and is sufficient to continue Respondent's liability.

In March 1970, Mrs. Good and her husband adopted a baby shortly thereafter she left the labor market thus tolling backpay.

Respondent adduced no evidence that Mrs. Good did not make a good-faith attempt to secure employment and indeed the General Counsel admits to interim

earnings commencing in the second quarter of 1966 that for the most part exceeded gross backpay.[12] I conclude that Respondent should make her whole by the payment to her of the amount set forth in the backpay specifications, as amended.

Dorothy Graham

Dorothy Graham's backpay period ends November 11, 1969, with the letter from Respondent offering her employment. The General Counsel admitted certain interim earnings and alleged certain expenses in attaining these interim earnings. Mrs. Graham appears to have searched in good faith for employment and to have found it, as a consequence of which her interim earnings for most quarters are greater than her gross backpay. I conclude that she should be paid by Respondent the figures alleged in the backpay specifications.

Mary Green

Mary Green's backpay period ends December 15, 1966, when she returned to Respondent's employ. During the year 1966 Mrs. Green had no interim employment, she sought employment from the Indiana Employment Security office and went to various local employers seeking work without success. Respondent has shown no reason why backpay should be reduced in any respect. Accordingly I recommend that she be paid in accordance with the figure set forth in the backpay specifications.

---

[12]During the hearing the General Counsel amended the backpay specification in significant respects.

Robetta (Harter) Pulver

Robetta Pulver's backpay period ends February 11, 1969, when she received, job offer from Laidlaw which she did not accept.

Mrs. Pulver testified that after her termination by Respondent she sought work in Kokomo, Indiana, and at a former employer in Peru and then found work at the South Side Tavern as a waitress where she worked until sometime in July when she went to work for a manufacturing concern. She stayed there until April 1967 when she left the labor market, returning early in October 1967 to work at the South Side Tavern until July 1968, when she again left the labor market. No backpay is claimed after that date.

During her employment at the manufacturing concern in 1966 and 1967 Mrs. Pulver was ill for a period of 5 or 6 weeks, however, she testified she was paid sick benefits by her employer at that time which is included in interim earnings. Accordingly no reduction in backpay for that quarter appears to be warranted.

Respondent contends that Mrs. Pulver's interim earnings should be increased by the amount of meals she was furnished free. She testified that she had a lunch each day she worked at the South Side Tavern valued at 40 to 50 cents. I shall increase interim earnings for the period of her employment at South Side Tavern by $2.50 a week.

While Mrs. Pulver appeared deliberately to have left the labor market on two occasions, there is no claim for backpay during those periods.

In the absence of any evidence that her search for employment while she was on the labor market was inadequate I shall recommend backpay on the basis claimed by the General Counsel in the specifications less the value of her lunches while employed at the Tavern.[13]

Elmer Hiers

Edwin Elmer Hiers' backpay period ends December 20, 1966, when he returned to Respondent's employ. During that period of time he had no interim earnings. Mr. Hiers had no skills and had been employed as a janitor. It appears that he made a normal search for employment without success and Respondent presented no evidence that he failed in any way to make a good-faith attempt to mitigate backpay. Accordingly I recommend that he be paid backpay in accordance with the specifications.

Gertrude Hight

Gertrude Hight's backpay period ends April 21, 1966, when she expired. Her daughter Marceline Rasmussen testified that after Mrs. Hight was terminated she applied at the Indiana Employment Security Division in Peru and received unemployment compensation checks and that her mother informed her on various occasions that she had been out looking for employment. She also testified that her mother died

[13]Mrs. Pulver was questioned about the value of tips received by her. She testified that she seldom received more than 25 or 50 cents a week in tips. I conclude that the evidence with regard thereto is too sparse and the amount too insignificant to warrant further consideration.

April 21, 1966, that she had no preceding illness or hospitalization and had not been under the care of a doctor prior to her death.

Respondent adduced no evidence that Mrs. Hight made anything less than an adequate attempt to find interim employment during her lifetime. I recommend that her estate be paid backpay on the basis set forth in the backpay specification as amended.

Elsie Hostetler

Elsie Hostetler's backpay period ends December 12, 1966, when she returned to work at Laidlaw Corporation. During the interim period Mrs. Hostetler had no employment. Her testimony reveals that she filed for unemployment compensation but did not otherwise seek work until she started to draw unemployment compensation in June 1966. It appears from her testimony that she made no effort to find employment until June and accordingly I shall recommend that she be paid backpay only from June 1 forward and that backpay from June 1 to the date of her reemployment by Respondent be computed on the basis set forth in the backpay specifications.

Betty Houk

Betty Houk's backpay period ends November 13, 1969, when she received a job offer from Respondent.

After her termination Mrs. Houk went immediately to the Unemployment Security Division office and registered and made a considerable search for employment along with other employess. She was quite suc-

cessful, as a consequence of which no backpay is sought for most of the quarterly periods. On two occasions she was on layoff by her interim employers and during those periods of time she made an adequate attempt to find other employment. I conclude that she should receive backpay on the basis set forth in the backpay specifications.

Nellie Hughes

Nellie Hughes' backpay period ends December 27, 1966, when she returned to work for Respondent. During the intervening period she had no interim employment, although she sought employment and registered with the Unemployment Security Division.[14] I conclude that she should be paid in accordance with the backpay specifications.

Marjorie Johnson

Marjorie Johnson's backpay period ended when she received and accepted Respondent's offer to rehire her in December 1966. During the intervening period she filed for unemployment compensation and got it and searched and found no employment and accordingly had no interim earnings. Respondent adduced no evidence that she made less than a good-faith search for employment and therefore I recommend that she be paid backpay in accordance with the specifications.

---

[14]Mrs. Hughes testified that she sought employment in company with Norma Black whom I have already found made a good-faith effort to find interim employment.

Risa Johnson Nance

Risa Nance's backpay period ends December 19 when she returned to Respondent's employment. During the backpay period she found no employment and thus had no interim earnings. Respondent adduced no evidence that she made other than a good-faith search for employment during the backpay period or that she was otherwise out of the labor market. Accordingly I recommend that she be paid in accordance with the backpay specifications.

Marilyn Jones

Marilyn Jones' backpay period ends November 16, 1969, when she was offered a job by Respondent. Mrs. Jones appears to have made a good-faith effort to find employment and went to work on March 15, 1966, for the A.G.P. Corporation. She continued to work there into the fourth period of 1966, when she quit because she was only getting part-time employment. The following workday she commenced work at another employer in Wabash, Indiana, where she continued to work except for a period of layoff until the fourth quarter of 1969. During the entire period of her employment in Wabash she drove her automobile with her sister as a passenger, the gasoline for her week's driving cost approximately $6 a week and her sister paid her $3. The General Counsel requests an allowance for expenses of $3 a week. In view of the fact that the General Counsel is not requesting all the expenses of the automobile during this period but merely gasoline expense, I consider that his position is reasonable and the $3 per week should be allowed. In

August 1966, Mrs. Jones took a vacation of 1 week from A.G.P. Corporation. She would not have earned a vacation had she continued in Respondent's employ. Accordingly I believe that that week should be deducted from the gross backpay since she was paid by A.G.P. Corporation for the week. I therefore shall reduce the gross backpay and the net backpay to that extent.

In 1967 between August 20 and 27, Mrs. Jones again took a vacation of 1 week. At this time she was on layoff from her present employer. The record reveals that during the period of her layoff she searched for employment without success. She was recalled by the A.G.P. Corporation but her husband refused to permit her to return there because she developed a nervous condition during her first employment with A.G.P. and he did not want her to work there again. She testified that on two occasions she sought medical advice with regard to her nervous condition. I conclude that her refusal to return to A.G.P. was reasonable in view of her prior experience there both with regard to the part-time characteristics of the job and her nervous condition and I conclude therefore that she does not waive her backpay rights by her refusal to return to that employer. However with regard to the vacation, inasmuch as it was taken during the layoff period, she took herself out of the labor market for a period of 1 week and I believe that the backpay for that period should be reduced accordingly.

I recommend that Mrs. Jones be recompensed by Respondent by the payment to her of the amount of

backpay set forth in the specifications less the vacation period 1966 and 1967.

Betty Kline

Betty Kline's backpay ends September 11, 1967, when she returned to Respondent's employ. During the backpay period Mrs. Kline made a good-faith effort to find employment and ultimately found employment on June 1, 1966. Her new employer laid her off in December 1966 and she continued on layoff for several months into 1967 when she was recalled. In September 1967 she was on layoff again and applied to her old foreman at Respondent's plant who put her to work September 11. Shortly thereafter, during a layoff by Respondent, she went back to work for her interim employer, however, the General Counsel seeks no backpay after September 11, 1967. The General Counsel seeks expenses of $6 for 60 miles for Mrs. Kline to seek employment prior to her first employment with an interim employer. I find that the claim is reasonable and recommend that interim earnings be reduced by $6 for the second quarter of 1966.

I recommend that Mrs. Kline be reimbursed by payment to her in the amount set forth in the backpay specification.

Janett Lampkin

Janett Lampkin's backpay period ends November 16, 1966, when she was offered a job by Respondent. When she was terminated she immediately contacted a former employer and was put back to work there,

apparently about February 15. She was employed during each quarter of the backpay period, although apparently in some quarters she did not work full time. Respondent has made no showing that she deliberately incurred loss of earnings or failed to diminish insofar as possible backpay. Accordingly I recommend that she be paid backpay in accordance with the specifications as they were amended at the hearing.

Lavone Landis

Lavone Landis' backpay period ends December 14, 1966, when she returned to work at Laidlaw.

During the backpay period Mrs. Landis sought work and in the second quarter of 1966 obtained work at Wabash, Indiana. After 18 days of employment Mrs. Landis' car broke down on the way home from Wabash, Indiana. The next morning she telephoned her employer and quit. She testified that the reason that she quit was that she did not trust her car to carry her back and forth to Wabash. There is no explanation given for the fact that she made no effort to ride with other employees who, the record reveals, were daily driving to the same plant from Peru, Indiana, and although her car was repaired shortly after she left the employ of the Wabash firm she made no effort to be reinstated there. Indeed it was not until July 20 that she resumed seeking employment in the Peru area. She found no employment although it appears that her search was reasonable then until her recall by Respondent. In view of the above facts, I find that Mrs. Landis did not make a good-faith at-

tempt to mitigate backpay between her resignation from her interim employer in Wabash, Indiana, and her resumption of her search for work on July 20. Accordingly I shall deduct from her gross earnings that period of time and I recommend that with that deduction she be recompensed by Respondent for backpay in accordance with the backpay specification.[15]

Mary Lepkojus Bridges

Mary Bridges' backpay period ends March 30, 1967, when she removed herself from the labor market. For years prior to her termination of employment by Respondent, Mrs. Bridges had been employed part time in a second job working in a hospital. After her discharge by Respondent she continued her evening employment and looked for full-time work, finding it in May in a nearby town, Wabash, Indiana. She continued working there until the first quarter of 1967, after which time she removed herself from the labor market and went to work full time at the hospital. During the period of time that she worked at the plant in Wabash, she drove her own car and estimated that the additional expense, some 28 miles round trip over the driving that she had done to Respondent's plant, was approximately $1 a day. Accordingly the backpay specifications seek to reduce interim earnings by expenses of $1 per day. Respondent showed neither that she did not make a good-faith effort to find employment or that her expenses were other than as stated. Accordingly I recommend that backpay be af-

[15]See *Cornwell Co.*, 171 NLRB 342.

forded her in accordance with the specifications as amended at the hearing.

Marie Nichols

Marie Nichols' backpay period according to the General Counsel ends January 13, 1967, when she returned to work at Laidlaw. The record reveals, however, that Mrs. Nichols was called back to work in December 1966 but was in the hospital at the time and returned to work at Laidlaw as soon as she was able to work after getting out of the hospital. She testified that she went in to the hospital on November 25 and was operated on the following day. Accordingly she was out of the labor market from that date forward and I shall reduce the gross backpay and net backpay for the last quarter of 1966 and strike the gross backpay and net backpay alleged for the first quarter of 1967 for Mrs. Nichols. Mrs. Nichols was not shown to have made less than a good-faith effort to find interim employment although she succeeded in finding none. Accordingly I recommend that she be paid on the basis of the backpay specifications for the period between February 12 and November 25, 1966.

Kathleen Ousley

Kathleen Ousley's backpay period began February 12, 1966, and ends December 15, 1966, when she returned to work for Respondent. During the backpay period Mrs. Ousley had no interim employment or earnings. The record reveals that she made a good-faith effort to find interim employment. There is no

evidence that she deliberately incurred any loss. Accordingly I recommend that she be recompensed on the basis of the backpay specifications.

Bertha Parham

Bertha Parham had been employed only a few days by Respondent when the strike began on January 11, 1966. In the first week of picketing she was struck by an automobile and spent 4 or 5 weeks in the hospital. She was in the hospital on February 12 when she was terminated. I note that the gross backpay alleged for Mrs. Parham is less than that alleged for other persons similarly situated and no evidence to the contrary having been adduced at the hearing, I assume that the reason therefore is that the gross backpay was reduced for the first quarter of 1966 because of her period of time in the hospital.[16] In the second quarter of 1966 Mrs. Parham found work in a nearby town where she continued to work until she was informed that she was to be cut from 48 hours a week to 4 days at 5 hours each, a total of 20 hours a week. Because of the travel necessitated by the employment she deemed it uneconomical to continue working for the employer and quit her job. I consider that this is not an unreasonable action for her to take.

Several weeks after quitting her first employer Mrs. Parham took herself out of the labor market for 2½ weeks while she took a vacation. Thereafter, she re-

[16]Respondent admitted gross backpay in its answer to the amended specifications.

turned to Peru and in the fourth quarter commenced work at the Noncommissioned Officers Club at Grissom Air Force Base near Peru. She continued working there after she was called back to Respondent's employ in January 1967. Mrs. Parham testified that she made about $10 a week in tips while she worked at the NCO club. It is not possible to ascertain from the documentary evidence whether these tips are included in the interim earnings reported by the employer to the Social Security Administration or admitted by the General Counsel, nor did Respondent make any attempt to ascertain the facts in that regard. Accordingly I presume the interim earnings reported include the tips, as I.R.S. regulations require.

The record does not reveal at what time during the summer Mrs. Parham took her 2½ week vacation. Accordingly I have averaged the number of hours per week for the third quarter of 1966 and subtracted from the gross backpay for that quarter five-twenty-sixths of the total.

Although the General Counsel admits no interim earnings for the first quarter of 1967 and Respondent admits that the backpay period ends January 9, 1967, Mrs. Parham testified that she continued in the employ of the NCO club until and indeed after she resumed her employment with the Respondent. In the absence of any explication of her earnings for that period I recommend that the gross backpay for the period be reduced by one-tenth of the interim earnings shown for the quarter on the social security form furnished for Mrs. Parham, $53.86.

In the absence of any evidence that Mrs. Parham did not make an adequate search for employment during the backpay period, especially in view of the fact that she held two jobs during that period of time, I recommend that she be reimbursed by the payment to her of the amount shown in the backpay specifications less the reductions set forth above.

Rozena Patterson Hudson

Rozena Hudson's backpay ended November 16, 1969, when she received a job offer from Respondent. The record reveals Mrs. Hudson was unemployed the first quarter and part of the second quarter of 1966 but made a good-faith effort to seek work. In 1966 she took a job with Eck-Adams Corporation which she continued into the third quarter of 1966. She left Eck-Adams Corporation and went to work for Wagner Industries during the third quarter in order to receive more pay. I find that she lost no earnings between the Eck-Adams and Wagner employment. Thereafter the lady with whom Mrs. Hudson rode to the job at Wagner quit and Mrs. Hudson quit too. She gave no reason for her failure to continue employment and made no search for another ride. Under these circumstances it appears that her loss of employment was deliberate. She was employed for 2 weeks at Wagner for a total of $103.68, therefore I shall add an additional $51.84 to her interim earnings for that quarter because of her deliberate loss of earnings for the week that elapsed between her resignation at Wagner and her next job at A.G.P. Corporation.

Mrs. Hudson worked only two nights at A.G.P. receiving a gross of $46.40. She then quit because she didn't like it and was off 2 weeks until she went to work for Houlihan Sales Agency. I shall deduct from the gross backpay the amount of interim earnings which she lost as a result of her quit from A.G.P., 10 days at $23.20 a day, a total of $232.17.[17]

The record reveals that while employed at Houlihan she received free lunches valued at $4 a week. Mrs. Patterson worked at Houlihan's 2 weeks in October and for the rest of the year. Accordingly I shall deduct $36 additional for the fourth quarter of 1966 and $52 for the first quarter of 1967 at the end of which Houlihan's went out of business. Mrs. Patterson was out of the labor market until the first quarter of 1968 when she secured employment at Chamberlain Products in Akron, Indiana. She quit her job at Chamberlain, which was too far to travel, but for the next month made no application for employment. The record reveals that the distance from Peru to Akron was 21 miles. Accepting her explanation that it was too far to drive to Akron to work at Chamberlain's I must nevertheless consider that by a lack of application for other employment Mrs. Patterson removed herself from the labor market immediately upon her quit from Chamberlain's employ. Accordingly I shall subtract from the gross backpay for the first quarter of 1968 the 2d, 3d, 4th and 5th weeks' earnings, a total of $238. In addition Mrs. Patterson testified that she was out of the labor

[17]See *Miami Coca-Cola Bottling Co.*, 151 NLRB 1701, 1703-04.

market on March 15, 1968, when she had an automobile accident. I note that the gross backpay attributed to her account by the General Counsel is for the entire quarter, I shall deduct the last 2 weeks from the gross backpay, a total of $137.08. Thus the total gross backpay for the first quarter of 1968 is $439.77.

The General Counsel claims no backpay for the second and third quarters of 1968 because Mrs. Patterson was out of the labor market, having a baby. She reentered the labor market in the fourth quarter of 1968. However it was not until the end of October that she commenced looking for employment. I note that the General Counsel has alleged full gross backpay for that quarter. I shall deduct the first 4 weeks thereof, reducing the gross backpay for the fourth quarter of 1968 to $647.40. Mrs. Hudson went to work for Kofabco about November 1, and worked for a month and then quit about December 1 in order to take care of her child. Although the General Counsel shows her out of the labor market the first two quarters of 1969 he shows her in the labor market the entire fourth quarter of 1968. Inasmuch as no valid distinction appears between the last month of 1968 and the first quarters of 1969 I shall further reduce the gross backpay for the entire month of December 1968 a total of $257.60 leaving a net backpay of $173.81. During the third and fourth quarter of 1969 Mrs. Hudson worked at Crofton Inc. Croften closed in the fourth quarter. There is no evidence that Mrs. Hudson did not make a good-faith search for em-

ployment after its closure and I note that the fourth quarter gross backpay has been reduced. Accordingly I shall adopt the figure as set forth in the backpay specification for that period.

Margaret Pierce

Margaret Pierce's backpay period ended July 1, 1966, when she voluntarily removed herself from the labor market. She had no employment in the first quarter of 1966, however it appears that she made a good-faith effort to find employment and Respondent adduced no evidence to the contrary. She found interim employment on April 20, 1966, and had interim earnings of such a substantial nature that the net backpay for that quarter is only 92 cents. I recommend that she be reimbursed in accordance with the computation set forth in the specifications, as amended.

Wanda Rose

Wanda Rose's backpay period ends November 14, 1969, when she returned to Respondent's employ. There is no evidence that Mrs. Rose did not search diligently for employment and in the second quarter of 1966 she secured employment in a nearby town. She quit this employment because her work entailed connecting fine wires in electrical components and her eyesight was too poor to enable her to continue. I find that she was justified in quitting. This was on approximately June 21. She resumed her search for employment and in the third quarter of 1966 secured employment at a hotel where she worked for

$1 an hour, she continued working there just short of a month and quit for no good reason and resumed her search for other employment. She found another job on August 24, 1966. Mrs. Rose had no recollection of the dates of her employment at the hotel; the social security records reveal no earnings prior to the third quarter of 1966. Inasmuch as she went to work for A.G.P. in the 7th week of the third quarter and worked approximately 3½ of those weeks at the hotel, I presume she commenced work about July 1. Inasmuch as there is no justification for her quitting the hotel job I shall increase her interim earnings based on $40 per week, up to the date of her hire on August 24, a total of $280 thus reducing her net backpay for the quarter to $154.46.

Mrs. Rose continued working until December 13, 1966, on which date she quit because she was working on the third shift and could not continue to work that shift and take care of her children. (She had been employed at Respondent's factory on the second shift.) I find that this quit was justified. Thereafter she worked 1 day for another employer on a temporary basis.

The backpay specification shows Mrs. Rose to be out of the labor market from January 1, 1967, until September 7 when she went to work for another employer. However she testified that she commenced working at a local restaurant approximately January 1, and continued on that job until the September 7 date at $40 a week with about $2.50 a week in tips. Inasmuch as she was clearly not out of the labor

market during this period I shall compute her gross backpay at $805.63 for the first quarter of 1967 and $631.14 for the second quarter of 1967 and deduct therefrom interim earnings in the amount of $552.50 for each quarter leaving a net backpay of $253.13 for the first quarter of 1967 and $78.64 for the second quarter of 1967.

Mrs. Rose continued in the employment of the General Tire and Rubber Company commencing September 7, 1967, until she returned to Respondent's employ. The specifications show interim earnings of $58 in the first quarter of 1968 from the "Little Gem" restaurant. Mrs. Rose's testimony reveals however that her employment at the Little Gem restaurant was in addition to her full-time employment at General Tire. The Board does not normally deduct part-time employment earnings which are supplemental and outside of full working hours.[18] Accordingly I shall strike that item leaving interim earnings in the first quarter of 1968 of $753.79 and net backpay of $61.89.

The General Counsel points out and Respondent agrees that in the third quarter of 1967 Mrs. Rose worked 7 weeks at $40 a week at the restaurant and suggests an additional deduction of $280 for that quarter.

I recommended that Mrs. Rose be reimbursed by Respondent in the amount set forth in the backpay specification with the changes set forth above.

---

[18] *Miami Coca-Cola Bottling Company, supra.*

Dorothy Scotten

Dorothy Scotten's backpay period ends September 1, 1967, when she returned to Respondent's employ. Mrs. Scotten had no interim earnings in the first quarter of 1966 although the record reveals that she made an adequate search for employment. In the second quarter she got a job in a furniture factory. During that quarter, while seeking employment, she drove in excess of 240 miles looking for work in various towns around the Peru area. The General Counsel seeks expenses in the sum of $24. I find that the record justifies this expense and it should be allowed. In the third quarter of 1966, Mrs. Scotten quit her job at the furniture factory because the work was too hard for her. She is a slight woman who was then 55 years of age and her job was screwing backs on chairs with a power screwdriver. I find this quit was justified. In any event the next day she went to work for Wagner Industries molding powdered plastic. After a few days her hands and arms began breaking out, apparently from an allergic reaction to the powder and her physician recommended that if she could not be transferred to other work that she quit. She sought a transfer but was refused and accordingly in September 26 quit that employment. She continued unemployed until the second quarter of 1967. During the interim period she appears to have made a good-faith attempt to find work. On April 11, 1967, she went to work for Bailey Manufacturing where she continued until recalled to Respondent's

employ.[19] I recommend that Mrs. Scotten be reimbursed by Respondent in the amount set forth in the specification.

Lois Snow

Lois Snow's backpay period ends December 13, 1966, when she returned to Respondent's employ. During the entire year of 1966 Mrs. Snow had no interim earnings. The record reveals no evidence that she did not diligently search for interim employment. Respondent would exclude a period of 2 weeks during which Mrs. Snow went with her husband to visit her mother in Arkansas, some 600 miles away. Mrs. Snow testified that this took place during the summer of 1966 and that she had made arrangements with her next door neighbor to open her mail and telephone her in the event any call for employment was received, but that none was received during that time. Respondent has made no showing that any employment became available to Mrs. Snow during that period of time. The Board has frequently held with the approval of the courts that a good-faith search for employment does not necessitate that the employee spend all of every day searching for employment. It appears that Mrs. Snow had made application where she could at the various plants in and around Peru, Indiana, that were hiring during that period and there is no evidence that it would not have been futile for her to have continued during the 2 weeks that she

[19]Mrs. Scotten was unemployed at the time of the strike settlement. Although the Union's negotiating committee attempted to get her reemployed by Respondent at that time, Respondent refused to do so.

spent on vacation with her husband. Accordingly I decline to diminish the gross backpay in that manner. I recommend that she be reimbursed in the figure set forth in the specifications.

Catherine Wolfe

Catherine Wolfe's backpay period terminated in December 1966 when she returned to Respondent's employ. During the interim period she had no employment although it appears from the record that she made a good-faith effort to find employment. Respondent would deduct the first week of July from the gross backpay because Mrs. Wolfe was on vacation during that time with her husband. I believe the same considerations are applicable to Mrs. Wolfe as to Mrs. Snow, *supra*. Accordingly I decline to reduce the gross backpay in this amount. I recommend that she be reimbursed in the amount set forth in the backpay specifications.

Alexander Zelinsky

Alexander Zelinsky's backpay period ends November 16, 1969, when he received a letter offering him employment with Respondent. During the period October 5, 1966, to August 26, 1969, Mr. Zelinsky was in military service; accordingly no gross backpay is alleged.

Immediately after his termination by Respondent in 1966 Mr. Zelinsky sought employment and found it on March 8 in a neighboring plant. He continued in that employ until he went into military service

and returned there when he was mustered out. Thus the net backpay sought by General Counsel results from the difference between his interim earnings and his gross backpay. I recommend that he be reimbursed in the amounts sought in the backpay specifications.

The record reveals that Larry Condon, Janice Coll and Patricia Miller all had no backpay. Those three employees did not appear at the hearing. The parties agreed on net backpay figures for Diane Bakke, Mildred Glaze, William Massey, Patricia Viertel and Earlene Watson. I recommend that they be paid in the amount so stipulated.

The parties additionally stipulated to the amounts of net vacation backpay for the years 1967, 1968, 1969 and 1970 for those employees who were rehired by Respondent during the period February 12, 1966, and the date upon which Respondent closed its doors in 1973. These employees were hired as new employees and deprived of the vacation they would otherwise have received under Respondent's contract with the Union had they been reinstated as ordered by the Board. The record is hereby reopened for the purpose of receiving the stipulation, it is received and the record is closed. The stipulated figures have been added to the net backpay for the third quarter of the year in which they appear, the stipulation was signed by Respondent "without prejudice to or a waiver of legal and equitable defenses raised by employers in amended answer and at the hearing." I have rejected the legal and equitable defenses raised by employer

in the amended answer and at the hearing. Accordingly I recommend that backpay be paid in accordance with the stipulation.

RECOMMENDED ORDER

Upon the basis of the foregoing findings and conclusions, it is ordered that Respondent, The Laidlaw Corporation, Peru, Indiana, its officers, agents, successors, and assigns shall pay to the employees involved in this proceeding as net backpay the amounts set forth below opposite their names as computed in the schedule attached hereto. Interest is to be added at the rate of 6 percent per annum on the respective amounts of backpay, computed in the manner prescribed in *Isis Plumbing & Heating Co.,* 138 NLRB 716. The net backpay awards are to be reduced by such tax withholdings as are required by Federal and state laws.

Richard L. Achey	$4,929.61
Steven M. Ackey	1,268.44
Diane M. Bakke	300.00
Mary Barnhill	667.97
Norma Black	2,780.53
Clara L. Blackmon	2,697.97
Myra J. (Bowman) Michael	2,853.73
Polly M. Bowman	2,166.39
Rhea M. Bowman	2,846.40
Christine (Brown) Asberry	1,858.83
Nanola Browning	1,878.88
Dorothy A. Cain	1,074.71
Larry A. Condon	-0-

Betty J. Crippen	2,740.44
Martha M. Dalton	3,644.91
Virginia Durham	2,846.88
Dovie D. Fisher	2,134.90
Marjorie P. Flitcraft	892.38
Mildred J. Glaze	1,850.00
Janice Goll	-0-
Garnet L. Good	2,113.11
Dorothy V. Graham	1,197.87
Mary A. Green	2,852.46
Bobetta J. (Harter) Pulver	1,745.72
Edwin Elmer Hiers	2,600.49
Gertrude Hight	565.37
Elsie Hostetler	1,947.46
Betty M. Houk	2,406.21
Nellie K. Hughes	2,754.54
Marjorie Johnson	2,862.22
Risa (Johnson) Nance	2,830.02
Marilyn D. Jones	2,477.02
Betty L. Kline	1,744.87
Janet L. Lampkin	2,449.48
Lavone Landis	2,337.51
Mary (Lepkojus) Bridges	838.79
William Massey	1,450.00
Patricia M. Miller	-0-
Marie L. Nichols	2,607.62
Eiko Oldham	699.11
Kathleen Ousley	2,857.76
Bertha L. Parham	2,308.34
Rozena E. (Patterson) Hudson	2,348.62
Margaret C. Pierce	346.32

Wanda Rose	2,208.79
Dorothy H. Scotten	3,259.21
Lois V. Snow	2,957.02
Patricia M. Viertel	750.00
Earlene L. Watson	1,131.53
Catherine Wolfe	2,829.19
Alexander Zelinsky	712.05

Dated at Washington, D.C., June 29, 1973

/s/ Paul E. Weil

Administrative Law Judge

Appendix

	Year	Quarter	Gross	Net Interim Earnings	Net Backpay
Richard L. Achey	1966	I	$ 414.72	none	$ 414.72
		II	913.24	$ 45.78	867.46
		III	928.59	333.20	595.39
		IV	1,051.02	429.35	621.67
	1967	I	954.44	609.00	345.44
		II	747.72	584.87	162.85
		III	840.53	652.13	188.40
		IV	974.57	520.60	453.97
	1968	I	949.15	995.26	—
		II	1,190.82	1,160.22	30.60
		III	1,088.66	256.05	832.61
		IV	1,143.37	740.80	402.57
	1969	I	139.83	125.90	13.93
					$4,929.61
Steven M. Achey	1966	I	414.72	none	414.72
		II	none	none	none
		III	290.61	131.04	159.57
		IV	1,051.02	441.67	609.35
	1967	I	118.44	56.00	62.44
	1967	III	vacation		22.36
					$1,268.44
Diane Bakke	stipulated net backpay				$ 300.00
Mary Barnhill	1966	I	360.58	none	360.58
		II	741.97	448.94	293.03
	1969	IV	626.42	612.06	14.36
					$ 667.97
Norma Black	1966	I	345.40	none	345.40
		II	760.61	none	760.61
		III	773.39	none	773.39
		IV	840.48	none	840.48
	1967	III	vacation		29.38
	1968	III	vacation		10.83
	1969	III	vacation		20.44
					$2,780.53

	Year	Quarter	Gross	Net Interim Earnings	Net Backpay
Clara Blackmon	1966	I	$ 345.40	none	$ 345.40
		II	760.61	none	760.61
		III	773.39	none	773.39
		IV	747.57	none	747.57
	1967	III	vacation		442.63
	1968	III	vacation		28.37
					$2,697.97
Myra J. (Bowman) Michael	1966	I	345.40	none	345.40
		II	760.61	none	760.61
		III	773.39	none	773.39
		IV	668.28	none	668.28
	1967	III	vacation		87.08
	1968	III	vacation		70.15
	1969	III	vacation		60.00
	1970	III	vacation		88.81
					$2,853.72
Polly M. Bowman	1966	I	345.40	none	345.40
		II	760.61	none	760.61
		III	773.39	none	773.39
		IV	693.40	556.00	137.40
	1967	III	vacation		85.11
	1968	III	vacation		64.48
					$2,166.39
Rhea M. Bowman	1966	I	345.40	none	345.40
		II	760.61	none	760.61
		III	773.39	none	773.39
		IV	668.28	none	668.28
	1967	III	vacation		87.37
	1968	III	vacation		67.71
	1969	III	vacation		62.72
	1970	III	vacation		80.92
					$2,846.40
Christine (Brown) Asberry	1966	I	345.40	100.17	245.23
		II	760.61	169.44	591.17
		III	773.39	759.13	14.26
		IV	878.16	703.70	174.46
	1967	I	805.63	629.06	176.57
	1968	I	393.49	193.76	199.73
		II	1,023.36	565.95	457.41
					$1,858.83

	Year	Quarter	Gross	Net Interim Earnings	Net Backpay
Nanola Browning	1966	IV	$ 630.22	none	$ 630.22
	1967	I	800.48	$ 78.75	721.73
		II	709.73	555.45	154.28
		IV	849.53	709.87	139.66
	1968	II	988.70	885.47	103.23
		III	980.41	909.50	70.91
	1969	II	990.06	931.21	58.85
					$1,878.88
Dorothy A. Cain	1966	I	360.58	76.10	284.48
		II	741.97	643.00	98.97
		III	796.55	648.00	148.55
		IV	945.33	607.50	337.83
	1967	I	391.53	306.00	85.53
		III	vacation		61.26
	1968	III	vacation		35.73
	1969	III	vacation		22.36
					$1,074.71
Larry A. Condon					— 0 —
Betty J. Crippen	1966	I	345.40	none	345.40
		II	760.61	none	760.61
		III	773.39	none	773.39
		IV	668.28	none	668.28
	1967	III	vacation		71.63
	1968	III	vacation		64.36
	1969	III	vacation		56.77
					$2,740.44
Martha M. Dalton	1966	I	360.58	none	360.58
		II	741.97	none	741.97
		III	796.55	none	796.55
		IV	945.33	none	945.33
	1967	I	800.48	none	800.48
					$3,644.91
Virginia Durham	1966	I	360.58	none	360.58
		II	741.97	none	741.97
		III	796.55	none	796.55
		IV	785.71	none	785.71
	1967	III	vacation		60.77
	1968	III	vacation		46.11
	1969	III	vacation		54.24
	1970	III	vacation		.95
					$2,846.88

	Year	Quarter	Gross	Net Interim Earnings	Net Backpay
Dovie D. Fisher	1966	I	$ none	none	$ none
		II	508.31	none	508.31
		III	796.55	none	796.55
		IV	830.04	none	830.04
					$2,134.90
Marjorie P. Fliteraft	1966	I	345.40	none	345.40
		II	760.61	$ 413.04	347.57
	1967	III	709.48	661.96	47.52
	1968	III	935.57	861.35	74.22
	1969	III	913.04	835.37	77.67
					$ 892.38
Mildred J. Glaze	stipulated total				$1,850.00
Janice Goll	no backpay				— 0 —
Garnet L. Good	1966	I	360.58	none	360.58
		II	741.97	403.65	338.32
		IV	945.33	873.16	72.17
	1967	III	747.27	557.92	189.35
		IV	849.53	407.59	441.94
	1968	III	980.41	905.21	75.21
	1969	III	993.36	951.55	41.81
		IV	1,193.83	989.63	204.20
	1970	I	1,013.88	740.00	273.88
		II	844.80	729.15	115.65
					$2,113.11
Dorothy V. Graham	1966	I	345.40	none	345.40
		II	760.61	267.31	493.30
		IV	878.16	851.14	27.02
	1967	I	805.63	783.00	22.63
		III	709.48	562.56	146.92
	1968	III	935.57	874.44	61.13
	1969	I	886.74	853.28	33.46
		III	401.29	333.28	68.01
					$1,197.87
Mary A. Green	1966	I	360.58	none	360.58
		II	741.97	none	741.97
		III	796.55	none	796.55
		IV	785.71	none	785.71
	1967	III	vacation		61.26
	1968	III	vacation		46.10
	1969	III	vacation		60.29
					$2,852.46

	Year	Quarter	Gross	Net Interim Earnings	Net Backpay
Bobetta J. (Harter) Pulver	1966	I	$ 345.40	$ 44.50	$ 300.90
		II	760.61	557.50	203.11
		III	773.39	700.31	73.08
		IV	878.16	397.47	480.69
	1967	I	805.63	692.71	112.92
		IV	824.94	591.60	233.34
	1968	I	815.68	474.00	341.68
					$1,745.72
Edwin Elmer Hiers	1966	I	313.06	none	313.06
		II	689.38	none	689.38
		III	700.97	none	700.97
		IV	697.55	none	697.55
	1967	III	vacation		56.16
	1968	III	vacation		62.65
	1969	III	vacation		80.72
	1970	III	vacation		-3.90[20]
					$2,600.49
Gertrude Hight	1966	I	345.40	none	345.40
		II	219.97	none	219.97
					$ 565.37
Elsie Hostetler	1966	II	229.58	none	229.58
		III	773.39	none	773.39
		IV	668.28	none	668.28
	1967	III	vacation		85.06
	1968	III	vacation		62.58
	1969	III	vacation		49.10
	1970	III	vacation		79.47
					$1,947.46
Betty M. Houk	1966	I	345.40	none	345.40
		II	760.61	315.80	444.81
	1967	I	805.63	187.68	617.95
		III	709.48	437.97	271.51
		IV	824.94	98.40	726.54
					$2,406.21

[20]The parties stipulated that Hier's 1970 vacation backpay was *minus* $3.90, and subtracted it from the total vacation backpay. This deduction is not appropriate under the rule in *F. W. Woolworth Co.*, 90 NLRB 289, in the absence of gross backpay in 1970 quarter III, and I have therefore not subtracted $3.90 from the total.

	Year	Quarter	Gross	Net Interim Earnings	Net Backpay
Nellie K. Hughes	1966	I	$ 345.40	none	$ 345.40
		II	760.61	none	760.61
		III	773.39	none	773.39
		IV	827.92	none	827.92
	1967	III	vacation		30.74
	1968	III	vacation		16.48
					$2,754.54
Marjorie Johnson	1966	I	360.58	none	360.58
		II	741.97	none	741.97
		III	796.55	none	796.55
		IV	773.75	none	773.75
	1967	III	vacation		76.37
	1968	III	vacation		61.80
	1969	III	vacation		51.12
	1970	III			.08
					$2,862.22
Risa (Johnson) Nance	1966	I	360.58	none	360.58
		II	741.97	none	741.97
		III	796.55	none	796.55
		IV	817.48	none	817.48
	1967	III	vacation		46.36
	1968	III	vacation		31.28
	1969	III	vacation		34.98
	1970	III	vacation		.82
					$2,830.02
Marilyn D. Jones	1966	I	360.58	67.75	292.83
		II	741.97	480.31	261.66
		III	740.17	716.18	23.99
		IV	945.33	699.72	245.61
	1967	I	800.48	704.95	95.53
		II	709.73	13.36	696.37
		III	687.89	257.37	430.52
		IV	849.53	788.32	61.21
	1968	I	799.80	748.57	51.23
		III	980.41	913.65	66.76
	1969	I	943.55	905.67	37.88
		II	990.06	980.46	9.60
		III	993.36	878.67	114.69
		IV	626.42	537.28	89.14
					$2,477.02

	Year	Quarter	Gross	Net Interim Earnings	Net Backpay
Betty L. Kline	1966	I	$ 360.58	none	$ 360.58
		II	741.97	$ 296.28	445.69
	1967	I	800.48	none	800.48
		III	556.14	418.02	138.12
					$1,744.87
Janet Lampkin	1966	I	360.58	289.54	71.04
		II	741.97	296.53	445.44
		III	796.55	442.39	354.16
		IV	945.33	772.00	173.33
	1967	I	800.48	474.78	325.70
		II	709.73	140.16	569.57
	1968	III	980.41	960.16	20.25
		IV	928.94	686.64	242.30
	1969	II	990.06	899.08	90.98
		III	993.36	836.65	156.71
					$2,449.48
Lavone Landis	1966	I	345.40	none	345.40
		II	584.24	202.95	381.29
		III	594.87	none	594.87
		IV	705.96	none	705.96
	1967	III	vacation		88.32
	1968	III	vacation		68.63
	1969	III	vacation		65.71
	1970	III	vacation		87.33
					$2,337.51
Mary (Lepkojus) Bridges	1966	I	345.40	none	345.40
		II	760.61	370.35	390.26
		IV	878.16	847.33	30.83
	1967	I	805.63	733.33	72.30
					$ 838.79
William Massey	stipulated net backpay				$1,450.00
Patricia Miller					— 0 —
Marie Nichols	1966	I	345.40	none	345.40
		II	760.61	none	760.61
		III	773.39	none	773.39
		IV	526.74	none	526.74
	1967	III	vacation		75.00
	1968	III	vacation		67.12
	1969	III	vacation		59.36
					$2,607.62

	Year	Quarter	Gross	Net Interim Earnings	Net Backpay
Eiko Oldham	stipulated net backpay				$ 411.42
	1968	III	vacation		122.83
	1969	III	vacation		81.30
	1970	III	vacation		83.56
					$ 699.11
Kathleen Ousley	1966	I	360.58	none	360.58
		II	741.97	none	741.97
		III	796.55	none	796.55
		IV	785.71	none	785.71
	1967	III	vacation		61.21
	1968	III	vacation		50.52
	1969	III	vacation		61.14
	1970	III	vacation		.08
					$2,857.76
Bertha L. Parham	1966	I	344.58	none	344.58
		II	741.97	208.92	533.05
		III	659.84	none	659.84
		IV	945.33	192.43	752.90
	1967	I	71.83	53.86	17.97
					$2,308.34
Rozena E. (Patterson) Hudson	1966	I	345.40	none	345.40
		II	760.61	362.86	397.75
		III	773.39	655.08	118.31
		IV	878.16	664.40	213.76
	1967	I	805.63	479.50	326.13
	1968	I	439.77	372.68	67.09
		IV	389.80	215.99	173.81
	1969	III	913.04	329.60	583.44
		IV	540.75	417.82	122.93
					$2,348.62
Margaret C. Pierce	1966	I	345.40	none	345.40
		II	760.61	759.69	.92
					$ 346.32
Wanda Rose	1966	I	345.40	none	345.40
		II	760.61	366.94	393.67
		III	773.39	618.93	154.46
		IV	878.16	478.30	399.86
	1967	I	805.63	552.50	253.13
		II	631.14	552.50	78.64
		III	709.48	452.97	256.51
		IV	824.94	574.26	250.68
	1968	I	815.68	753.79	61.89
	1969	IV	540.75	526.20	14.55
					$2,208.79

	Year	Quarter	Gross	Net Interim Earnings	Net Backpay
Dorothy H. Scotten	1966	I	$ 360.58	none	$ 360.58
		II	741.97	254.40	487.57
		III	796.55	564.95	231.60
		IV	945.33	none	945.33
	1967	I	800.48	none	800.48
		II	709.73	548.82	160.91
	1968	III	vacation		116.86
	1969	III	vacation		77.84
	1970	III	vacation		78.04
					$3,259.21
Lois Snow	1966	1	360.58	none	360.58
		II	741.97	none	741.97
		III	796.55	none	796.55
		IV	761.79	none	761.79
	1967	III	vacation		91.31
	1968	III	vacation		61.99
	1969	III	vacation		60.51
	1970	III	vacation		82.32
					$2,957.02
Patricia M. Viertel	stipulated net backpay				750.00
Earlene L. Watson	stipulated net backpay				$1,131.53
Catherine Wolfe	1966	I	345.40	none	345.40
		II	760.61	none	760.61
		III	773.39	none	773.39
		IV	680.84	none	680.84
	1967	III	vacation		86.53
	1968	III	vacation		41.09
	1969	III	vacation		59.48
	1970	III	vacation		81.85
					$2,829.19
Alexander Zelinsky	1966	I	414.72	128.16	286.56
		II	913.24	897.47	15.77
		III	928.59	745.54	183.05
	1969	III	438.27	211.60	226.67
					$ 712.05

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1317

THE LAIDLAW CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

---

1. In July 1969, the court of appeals sustained the Board's finding that petitioner had violated the National Labor Relations Act by, *inter alia*, terminating striking employees and refusing to reinstate them after they made unconditional offers to return to work. The court entered a decree which directed petitioner to reinstate the striking employees, and to make them whole for any loss of earnings suffered as a result of petitioner's discrimination against them.[1]

---

[1] *The Laidlaw Corp.* v. *National Labor Relations Board*, 414 F.2d 99 (C.A. 7), certiorari denied, 397 U.S. 920, enforcing 171 NLRB 1366.

In November 1972, after attempts to agree upon the amount of backpay owed to discriminatees proved unsuccessful, the Board issued a specification setting forth the backpay claims for 48 discriminatees. In November 1973, after a hearing, the Board determined that the discriminatees were owed backpay of $99,621.67, with interest at the rate of six percent (Pet. App. 8-74). On December 12, 1974, the court of appeals sustained the Board's decision and enforced the Board's backpay order in full (Pet. App. 1-7).

2. Petitioner's primary contention is that the Board failed to consider whether each discriminatee "lowered his sights" and sought lower paying interim employment during the backpay period (Pet. 6-11).

It is well settled, however, that willful loss of earnings is an affirmative defense which the employer has the burden of proving. See, *e.g.*, *National Labor Relations Board* v. *Brown & Root, Inc.*, 311 F.2d 447, 454 (C.A. 8); *National Labor Relations Board* v. *Mooney Aircraft, Inc.*, 366 F.2d 809, 812-813 (C.A. 5); *Golay & Co.* v. *National Labor Relations Board*, 447 F.2d 290, 295 (C.A. 7), certiorari denied, 404 U.S. 1058. To meet that burden, the employer must establish that each discriminatee "neglected to make reasonable efforts to find interim work." *National Labor Relations Board* v. *Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 575-576 (C.A. 5). Contrary to its contention (Pet. 6), petitioner did not introduce "extensive evidence concerning the length and scope of employee searches and the availability of suitable employment opportunities in other fields." The administrative law judge found that, except for some newspaper advertisements (sometimes illegible) covering a part of the backpay period and a letter from state authorities concerning the relative level of unemployment in the vicinity, petitioner introduced no evidence that any suitable job was available to a discriminatee

or that any discriminatee willfully failed to accept such employment (Pet. App. 21-24). Moreover, the judge found that almost without exception the discriminatees registered with the state employment security division, and no discriminatee was offered any employment (Pet. App. 23). In these circumstances, the court of appeals properly sustained the Board's finding that each discriminatee had made a reasonable search for employment and did not willfully incur loss of earnings (Pet. App. 4-5, 8-9, 24-62).

No conflict exists among the circuits on this issue. *National Labor Relations Board* v. *Madison Courier, Inc.*, 472 F.2d 1307, 1319-1321 (C.A. D.C.), *National Labor Relations Board* v. *Southern Silk Mills, Inc.*, 242 F.2d 697 (C.A. 6), certiorari denied, 355 U.S. 821, and *National Labor Relations Board* v. *Moss Planning Mill Co.*, 224 F.2d 702 (C.A. 4), upon which petitioner relies, are inapposite, since in those cases, unlike the instant case, the employer had sustained his burden of showing that there were "suitable" but lower paying jobs available.

3. Petitioner also contends (Pet. 11-14) that the court of appeals erred in sustaining the Board's finding that strike benefits were not earnings. As the Board and court below found, however, any assistance from the union during the strike in the form of strike benefits was computed on a formula based on need and family situation and ranged from $20 to $30 per week, plus $2 per child (Pet. App. 17-19). Thus the amount received was unrelated to the number of hours spent by the striker on the picket line, nor was a striker "docked" if he missed a picketing assignment by reason of illness or job searches. The strike benefit payment were disbursed only to unemployed strikers (*ibid.*). In these circumstances, the Board and the court below properly concluded that the sums received were collateral benefits flowing from the association of the discriminatees

with their union, rather than earnings from interim employment (Pet. App. 4, 12). The Board's decision is therefore fully in accord with *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U.S. 361.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

JUNE 1975.